TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 22 Sa.

THE OHIO OIL COMPANY, PLAINTIFF IN ERROR,

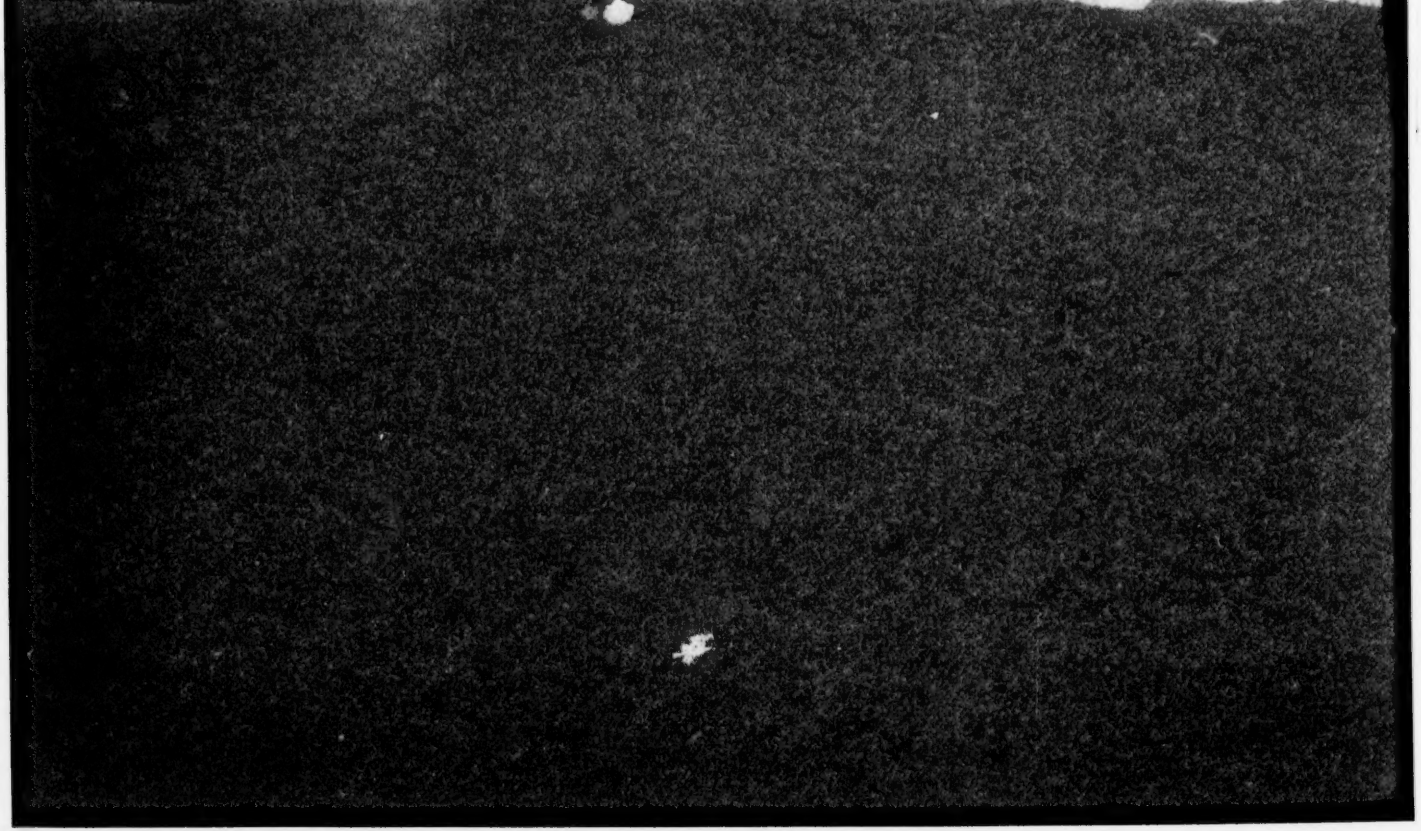
vs.

THE STATE OF INDIANA, FOR THE USE OF MADISON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED MAY 27, 1906.

(16,892.)



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1 And on the 29th day of March, 1898, being the 110th judicial day of the November term, 1897, comes the appellant, by counsel, and files his precipe with the clerk of this court, which is in the words and figures as follows:

In Supreme Court.

THE OHIO OIL COMPANY, Appellant,
vs.
THE STATE OF INDIANA, for the Use of MADISON County, Appellee. } No. 18498.

The clerk will please make complete transcript in above-entitled cause, including copy of the opinion in said cause, and also including copy of opinion referred to in the opinion in this cause as the basis thereof.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Appellant.

2 STATE OF INDIANA, *ss:*

Supreme Court.

Be it remembered that heretofore, to wit, on the 3rd day of January, 1898, The Ohio Oil Company, by its attorneys, M. F. Elliott and Stephenson, Shirts & Fertig, filed in the office of the clerk of the supreme court of Indiana a transcript of the record and proceedings of the Madison circuit court of said State, wherein said State of Indiana, for the use of Madison County, was plaintiff and The Ohio Oil Company was defendant, together with an assignment of errors endorsed thereon; which transcript and assignment of errors are in the words and figures following, to wit:

3 Pleas before the Honorable John F. McClure, sole judge of the Madison circuit court of the county of Madison, in the State of Indiana, at a term begun, held, and continued in the court-house, in the city of Anderson, commencing on the first Monday in May, 1897.

Transcript.

(In appeal.)

STATE OF INDIANA, *Madison County,* } *ss:*

Be it remembered that heretofore, to wit, on the 5th day of June, 1897, a complaint was filed in the office of the clerk of the Madison circuit court, wherein The State of Indiana, for the use of Madison County, is plaintiff and The Ohio Oil Company is defendant; which complaint is in the words and figures following, to wit:

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Complaint.

STATE OF INDIANA, } ss:
Madison County, }

Madison Circuit Court, May Term, 1897.

STATE OF INDIANA, for the Use of The County of Madison,
vs.
THE OHIO OIL CO.
} Complaint to Recover Penalty for Violation of Law.

The State of Indiana, for the use of The County of Madison, in said State, complains of the defendant, The Ohio Oil Co., a corporation duly organized under and pursuant to the laws of the
4 State of Ohio and doing business under such corporate name in the State of Indiana, and says that heretofore, to wit, on the 25th day of May, 1897, the said defendant had the possession and control of a natural-gas and oil well situated on the following-described real estate, in Madison county, in the State of Indiana, to wit: One acre in the northwest corner of the east half (½) of the southeast quarter (¼) of section seventeen (17), township twenty-one (21) north, range eight (8) east; that the said defendant was the lessee of the land on which said well was and is situate and *were* the owners of said well; that on said day *they* had drilled, shot, and completed said natural-gas and oil well and had struck gas and oil therein; that for more than two days next after gas and oil had been struck in said well said defendant unlawfully allowed and permitted the flow of natural gas from said well to escape into the open air without being confined within such well or proper pipes or other safe receptacle, contrary to the form of the statutes in such cases made and provided.

And the plaintiff further says that a right of action has accrued to have and recover from the defendant, for the use of said Madison county, the sum of two hundred dollars, together with costs and reasonable attorneys' fees; that a reasonable attorneys' fee for the recovery of said penalty is fifty dollars ($50.00).

Wherefore plaintiff demands judgment for the use of the county of Madison in the sum of two hundred and fifty dollars ($250.00) and the costs and all other necessary and proper relief.

2nd Par. of Complaint.

Paragraph 2nd.

The State of Indiana, for the use of Madison County, in said State, complains further of the defendant, the aforesaid Ohio Oil Co., and says that on the 25th day of May, 1897, the defendant was the owner and had the possession and control of a natural-gas and oil well situate on the following-described real estate, in Madison county and State of Indiana, to wit: One acre of the northwest

corner of the east half (½) of the southwest quarter (¼) of sec-
5 tion seventeen (17), township twenty-one (21) north, range eight (8) east; that on said day they had drilled said well and had struck gas and oil therein; that for more than ten days next after the two days allowed by law for the securing and confining of gas and oil in said well the said defendants unlawfully allowed, suffered, and permitted the flow of natural gas from said well to escape into the open air without being confined within such well or proper pipes or other safe receptacle, contrary to the form of the statutes in such cases made and provided.

And the plaintiff avers that a right of action has accrued to the plaintiff to have and recover from the defendant, for the use of said Madison county, the sum of two hundred dollars ($200.00), together with costs and reasonable attorneys' fees, as a penalty for said unlawful act; that a reasonable attorneys' fee for the recovery of said penalty is fifty dollars ($50.00).

Wherefore plaintiff demands judgment on this paragraph of complaint in the sum of two hundred and fifty dollars ($250.00), and on both paragraphs of this complaint the plaintiff demands judgment for five hundred dollars ($500.00), and all other necessary and proper relief.

DANIEL W. SCANLAN,
Prosecuting Attorney.

And afterwards, to wit, on the 11th day of September, 1897, the same being the 6th judicial day of the September term, 1897, of the Madison circuit court of the county of Madison, in the State of Indiana, the following proceedings were had in the cause entitled as follows, to wit:

6 STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL CO.

Come the parties, by counsel, and the defendant files its demurrer to each paragraph of complaint herein in these words, to wit:

Demurrer to Each Par. of Complaint.

STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL CO. } No. 12743.

The defendant demurs to the first paragraph of the complaint herein for the reason that the same does not state facts sufficient to constitute a cause of action.

And the defendant demurs to the second paragraph of the complaint herein for the reason that the same does not state facts sufficient to constitute a cause of action.

GEO. SHIRTS,
Att'y for Def't.

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Afterwards, to wit, on the 2nd day of November, 1897, the same being the 2nd judicial day of the November term, 1897, of the Madison circuit court of the county of Madison, in the State of Indiana, the following further proceedings were had in the cause entitled as follows, to wit:

STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL CO.

7 *Demurrer Overruled.*

Come the parties, by counsel, and the demurrer to the complaint is overruled by the court; to which ruling of the court the defendant excepts.

And afterwards, to wit, on the 22nd day of November, 1897, the same being the 19th judicial day of the November term, 1897, of the Madison circuit court of the county of Madison, in the State of Indiana, the following further proceedings were had in the cause entitled as follows, to wit:

STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL CO.

Come the parties, by counsel, and a rule is entered against the defendant to file answer by November 24th, 1897.

Afterwards, to wit, on the 23rd day of November, 1897, the same being the 20th judicial day of the November term, 1897, of the Madison circuit court of the county of Madison, in the State of Indiana, the following further proceedings were had in the cause entitled as follows, to wit:

STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL CO.

Come the parties, by counsel, and the defendant files its answer to the complaint herein in these words, to wit:

8 *Ans. to Complaint.*

THE STATE OF INDIANA, for the Use of MADISON COUNTY, Indiana,
vs.
THE OHIO OIL CO. } No. 12743.

The defendant for answer to the complaint herein says:

That before and at the time of the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor into the earth and rock below in said county of Madison, and that in the carrying on said business it had ex-

pended many thousands of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells and for pipes and pipe lines, all of which it then owned and still owns.

The defendant admits that it drilled the well complained of herein, but says that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county, and having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized, and the defendant being then and there engaged in transporting oil to and from the State of Indiana and among the various States in the United States.

That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same as so constructed and operated is not dangerous to life, health, nor property.

When said well was so drilled and completed, oil was found
9 therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land-owner the stipulated royalties therefor, and so operated the same with the knowledge, approbation, and consent of such land-owners, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action.

That in the same well and in the same strata of rock whence such oil was produced there *was* also found at said time large quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as a power, force, and agency to raise said oil from the rock-bearing strata below to the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that *it* if such gas should be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed and the people of said county and State will be deprived of the use and profits of such oil, which is vastly of more value than natural gas in said well.

And defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employees of the highest skill, and that no more

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gas was suffered to escape from such well than was consistent with the due operation of said oil well with the highest skill.

The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring said territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been expended and after said well had been completed.

That when the act of the legislature upon which this prosecution is founded was passed there was no combination gas and oil well existing in said State, wells having subsequently thereto been developed containing and producing both natural gas and oil, to which said statute does not apply.

That in the territory where said well complained of is situate there are a number of paying oil wells, owned and operated by various persons and corporations, and said field when properly developed may reasonably be expected to be a large one for the production of oil, which will be and is of very large value to the people of said county.

Wherefore defendant prays judgment for its costs and all other proper relief.

STEPHENSON, SHIRTS AND FERTIG,
Attorneys for Defendant.

And the plaintiff files its demurrer to the 2nd paragraph of answer herein in these words, to wit:

STATE OF INDIANA, } ss:
Madison County, }

Madison Circuit Court, November Term, 1897.

STATE OF INDIANA, for the Use of MADISON COUNTY, }
vs. }
THE OHIO OIL CO. }

Demurrer to Answer.

The plaintiff demurs to the defendant's answer, and for cause of demurrer says that said paragraph of answer does not state facts sufficient to constitute a cause of defense to plaintiff's complaint.

D. W. SCANLAN,
BLACKLIDGE & SHIRLEY,
LOVETT & HOLLOWAY,
Attorneys for Plaintiff.

Afterwards, to wit, on the 29th day of November, 1897, the same being the 20th judicial day of the November term, 1897, of the

Madison circuit court of the county of Madison, in the State of Indiana, the following further proceedings were had in the cause entitled as follows, to wit:

Demurrer to Ans. Sustained.

STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL CO.

Come the parties, by counsel, and the demurrer to the answer is sustained by the court; to which ruling of the court the defendant excepts.

And afterwards, to wit, on the 3rd day of December, 1897, the same being the 29th judicial day of the November term, 1897, of the Madison circuit court of the county of Madison, in the State of Indiana, the following further proceedings were had in the cause entitled as follows, to wit:

12 STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL CO.

Comes now the parties, by counsel, and the court having heretofore sustained the demurrer of the plaintiff to the answer heretofore filed by the defendant, and the defendant electing to abide said demurrer and failing and refusing to amend said answer or plead further to said complaint, and the court of its own motion having heard evidence as to the value of the attorneys' fees for plaintiff's attorney, now renders judgment for the plaintiff and against the defendant on the complaint.

Def't refuses to plead further.

It is therefore considered and adjudged by the court that the plaintiff recover of and from the defendant the sum of $400.00, the amount of the penalties for which the defendant has become liable and which has accrued to The State of Indiana for the use of The County of Madison under the statute in such cases made and provided, and the further sum of one hundred dollars attorneys' fee—in all, the sum of $500.00—all collectible without relief from valuation or appraisement laws; to which judgment the defendant objects and excepts; and the defendant now moves the court to modify said judgment by rendering judgment for $200.00 and attorneys' fees upon one paragraph of complaint; which motion the court overrules, and the defendant excepts to the ruling of the court; and the defendant also moves the court to modify said judgment by striking out the amount allowed for attorneys' fees; which motion the court overrules, and the defendant excepts at the time to the ruling of the court; and the court orders that said motion, rulings, and

Judgment.

Motion to modify judgment overruled. Exception.

Motion to modify judg't overruled. Exception.

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exceptions be made part of the record, without bill of exceptions; and the defendant now prays an appeal from said judgment to the supreme court of the State of Indiana, which prayer the court grants upon the filing within fifteen days of this date an appeal bond in the penal sum of $600.00, with Leonard Wild as surety thereon; all of which is ordered, adjudged, and decreed by the court.

Prayer of appeal granted.

13

Afterwards, to wit, on the 13th day of December, 1897, the same being the 35th judicial day of the November term, 1897, of the Madison circuit court of the county of Madison, in the State of Indiana, the following further proceedings were had in the cause entitled as follows, to wit:

STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL CO.

Come the parties, by counsel, and the defendant files its appeal bond herein; which bond is approved by the court, and which bond reads as follows, to wit:

Appeal Bond.

Know all men by these presents that we, The Ohio Oil Company, as principal, and Leonard Wild, as surety, are held and firmly bound unto The State of Indiana, for the use of Madison County, Indiana, in the penal sum of six hundred dollars; to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of December, 1897.

The condition of the above obligation is such that whereas heretofore, to wit, on the 3rd day of December, 1897, the said The State of Indiana, in the Madison circuit court, recovered a judgment against the said The Ohio Oil Company for the sum of five hundred dollars in damages and costs of suit, etc.; from which said judgment of said Madison circuit court the said The Ohio Oil Company appeals to the supreme court of Indiana:

14

Now, if the said The Ohio Oil Company shall well and truly prosecute said appeal and abide by and pay the judgment and costs which may be rendered or affirmed against it, then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

THE OHIO OIL COMPANY, [SEAL.]
Per GEO. SHIRTS, *Attorney.* [SEAL.]
LEONARD WILD. [SEAL.]

Bond Approved.

Approved in open court Dec. 13th, 1897.
JOHN F. McCLURE, *Judge.*

Clerk's Certificate.

STATE OF INDIANA, } ss:
Madison County, }

In the Madison Circuit Court, November Term, 1897.

STATE OF INDIANA, for the Use of MADISON COUNTY, INDIANA,
vs.
THE OHIO OIL COMPANY.

I, Edmund Johnson, clerk of the Madison circuit court of the county of Madison, in the State of Indiana, hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the papers and pleadings, rulings of the court thereon, and all the order-book entries in the above-entitled cause, as the same appear on file and of record in my office.

In testimony whereof I have hereunto affixed the seal of said court and subscribed my name, at Anderson, Indiana, this 31st day of December, 1897.

[SEAL.] (Signed) EDMUND JOHNSON,
Clerk Madison Circuit Court, Ind.

15 *Assignment of Errors.*

Filed Jan. 3, 1898. Alex. Hess, Clerk.

THE STATE OF INDIANA:

In the Supreme Court.

THE OHIO OIL COMPANY, Appellant,
vs.
STATE OF INDIANA, for the Use of MADISON COUNTY, Appellee.

Now comes the appellant and says there is manifest error in the proceedings and judgment in this cause, in this, viz:

1. The court erred in overruling the demurrer to the first paragraph of complaint.
2. The court erred in overruling the demurrer to the second paragraph of complaint.
3. The court erred in sustaining the demurrer to the answer.

Wherefore appellant prays that the judgment be in all things reversed.

R. R. STEPHENSON,
GEO. SHIRTS,
W. R. FERTIG,
Attorneys for Appellant.

16 And on January 4, 1898, an entry was made submitting this cause to the court for decision and notices thereof issued under amended rule XV of this court.

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And on the same day the cause was advanced and set for oral argument January 25, 1898.

And on January 14, 1898, appellant's counsel filed brief in said cause.

And on January 18, 1898, appellant's counsel filed points on oral argument.

And on January 27, 1898, an additional brief was filed by the Ohio Oil Co.

And on March 1, 1898, appellant's counsel filed a supplemental brief.

And on the 16th day of March, 1898, being the 99th judicial day of the term, came the parties, by their attorneys, and the court, being advised in the premises, affirms the judgment of the court below, with the following opinion pronounced by McCabe, J.:

17 THE OHIO OIL CO. *vs.* THE STATE OF INDIANA, for the Use of MADISON County. } No. 18498.

From the Madison circuit court.

MCCABE, *J.*:

The appellee sued the appellant to recover certain penalties prescribed by the act concerning natural gas and oil, approved March 4th, 1893 (Acts 1893, p. 300). The circuit court overruled a demurrer, for want of sufficient facts, to both paragraphs of the complaint, and also sustained a like demurrer to an answer of the appellant in a single paragraph in confession and avoidance; and the defendant failing to amend its answer or plead over and electing to stand on the same, the court rendered judgment in favor of the plaintiff for the penalties sued for and attorneys' fees, on evidence of the value of such attorneys' fees.

The same objections are urged against the sufficiency of the complaint, and the same reasons are urged in support of the sufficiency of the answer, involving the constitutionality and proper construction of the act above referred to, that were urged, discussed, and decided in the case of The State of Indiana *vs.* The Ohio Oil Co., No. 18476, at this term, and all the questions here raised were decided against the present appellant in that case.

The judgment in this case is therefore affirmed on the authority of that case.

18 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1897.

On the 10th day of March, 1898, being the — judicial day of said November term, 1897—Hon. Timothy E. Howard, chief justice; Hon. Leonard J. Hackney, Hon. Leander J. Monks, Hon. James H. Jordan, Hon. James McCabe, judges—in the case of—

THE STATE OF INDIANA
vs.
THE OHIO OIL CO. } 18476.

Appeal from the Madison circuit court.

Came the parties, by their attorneys, and the court, being sufficiently advised in the premises, gave the following opinion and judgment, pronounced by McCabe, J.:

19 The State of Indiana, by her attorney general and the prosecuting attorney in the Madison circuit court, brought suit against the appellee, The Ohio Oil Company, seeking to enjoin it from wasting natural gas.

The circuit court sustained the defendant's demurrer to the complaint for want of sufficient facts to constitute a cause of action, and, the plaintiff electing to abide said demurrer and refusing to amend its complaint or to plead further, the court rendered judgment that the plaintiff take nothing by its complaint, and that defendant recover costs. Upon this ruling alone the State assigns error.

The substance of the complaint is that for many years heretofore there has been underlying Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells, and other counties in Indiana a large deposit of natural gas, utilized for fuel and light by the people of those counties and of many other counties and cities in Indiana, including Indianapolis, Ft. Wayne, Richmond, Logansport, Lafayette, and others of the most populous cities of the State, to which cities the gas is conducted, after being brought through wells to the surface of the ground, by pipes and conduits, by means of which many hundreds of thousands of the people of Indiana are supplied with gas for light and fuel. The natural gas underlying the counties named and other portions of Indiana is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir in which the gas is confined under great pressure and from which it escapes, when permitted to do so, with great force. The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural-gas deposit to the State and its citizens is many millions of dollars. Since the discovery of the gas deposit in 1886 vast sums of money have come into the State and have been invested in building up large manufacturing interests, and vast sums of money belonging to the people of Indiana have been invested in similar enterprises, causing a great increase of population, principally in the territory underlying which gas is found. Many cities in and adjacent to the gas territory, including those named, are almost wholly dependent for fuel supply upon natural gas, and for that reason the people of Indiana have become and are

20 greatly interested in the protection and continued preservation of the gas supply. Many millions of dollars invested in manufacturing and other properties in and near the gas territory are wholly dependent for their continued operation and for the permanent

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value of their property upon the gas supply. Their location and establishment in the gas territory was due to the presence of natural gas underlying it, without which such enterprises could not be operated at a profit, and in the event that the supply of gas is exhausted in the territory many of such manufacturing enterprises (in which thousands of citizens of Indiana find employment at remunerative wages) will be compelled to suspend operations. Their employés will be thrown out of employment and many of them, being wholly dependent upon their labor for support, may and will become charges upon the State and its municipal subdivisions. The property of the manufacturing enterprises and the vast investments depending on them and related to them will become worthless and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now invested in these enterprises. In the cities named and in all the territory known as the "gas belt" the inhabitants have for years used practically no other fuel than natural gas. Their houses in many instances are constructed with a view to the use of natural gas and will have to be differently equipped before other kinds of fuel can be used. The cost of natural gas as fuel to the people in the gas belt, who number several hundreds of thousands, is very much less than that of any other fuel that has ever been or can be procured by them, and to the other inhabitants of the State using natural gas it has become and is a source of great convenience, and cleanliness as fuel. Many small villages in and near the gas territory have within a few years become flourishing and opulent cities The State's wealth and its revenues derived from taxation on account of such increased population and the various interests that have been fostered and supported by natural gas have been greatly increased, and will, in the event gas is exhausted, be correspondingly curtailed. The State of Indiana, relying upon the permanent supply of gas, has, at great expense, equipped
21 many of its public institutions, including the state-house, the Central and other hospitals for the insane, the asylums for the blind and deaf and dumb, the Institution for the Care of the Orphans of American Soldiers and Sailors, and other public institutions owned and maintained by the State of Indiana and its various subdivisions, together with the court-houses in many counties and a vast number of public schools, for the use of natural gas as fuel, by which the cost of maintaining the public buildings and institutions named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased. Natural gas exists in large reservoirs, or a series of reservoirs connected with each other, underlying the gas territory, and the diminution or consumption of natural gas taken from any part of them affects or reduces correspondingly the common supply. If the gas supply is accordingly husbanded and protected it will last for many years and continue to supply the various interests named with abundant fuel, and the population, wealth, and other material interests of the State will continue to be benefitted and enhanced, and the comfort,

enjoyment, and happiness of the people of the State greatly increased.

It is charged that about May 25th, 1897, the Ohio Oil Company, an Ohio corporation, as its name implies, caused a well to be drilled near Alexandria, Madison county, which produces natural gas and petroleum in large quantities. The location of this well is described, as well as that of five other wells drilled at about the same time as the one first named, all of which produce both natural gas and petroleum, and have done so ever since their completion. It is charged that, instead of securely anchoring the wells as drilled, so as to confine the gas produced by them within two days next after their completion, the defendant, ever since the completion of the wells, which have been completed for some time, has "unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been wasted and lost, and whereby the State's supply of natural gas has been greatly diminished, and the property of its citizens within the said gas territory dependent upon the continued supply of natural gas for fuel, as aforesaid, has been greatly damaged and decreased
22 in value." It is also charged that the defendant avows its purpose to permit the gas to escape continuously and indefinitely hereafter from said wells, and refuses to make any effort to confine it, and declares its purpose to drill other wells in the gas territory, and permit the gas therefrom to flow and escape into the open air, and that if the gas continues to flow from the wells the supply of natural gas upon which the citizens of the State depend will be greatly diminished; that the pressure of gas as found in said Trenton rock will be greatly diminished, and that by the diminution of such pressure water will accumulate in the rock stratum and ultimately and entirely displace and overcome the gas supply; that because of the wrongful acts of the defendant above described heretofore committed and now continuing its property and that of its citizens has been and will continue to be essentially interferred with, and the comfortable enjoyment of the lives of its citizens greatly interrupted; and plaintiff avers "that it has no adequate remedy at law for the redress of its grievances complained of; that it is impossible accurately to fix in dollars and cents the damage the plaintiff has sustained and will sustain by reason of the wrongful and unlawful acts of the defendant, if suffered to continue, and that the plaintiff's injuries on account thereof are and will be great and irreparable, and increase as said gas is permitted to flow and the number of wells wherein the same is unconfined continues to increase, and that the ordinary remedies, though repeatedly resorted to by plaintiff, have proved ineffectual to restrain or check the wrongful action of defendant."

It is charged that the penalties provided by law for the unlawful acts above described are wholly inadequate, and that the defendant has openly defied and continues to defy the lawfully constituted authorities of the State in their efforts to enforce and recover in the name of the State the penalties provided by law for such wrongful acts committed by the defendant, and that injunctive relief is nec-

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essary in order to restrain the continued wrongful acts of the defendant, and that, unless the same is given, one of the greatest natural resources of the State will be ultimately destroyed; that in order to obtain even a partial and inadequate remedy for the wrong done a multiplicity of suits must be resorted to, entailing great expense and affording no considerable relief, unless the de-
23 fendant is restrained and prohibited by injunction from doing the things complained of.

It is therefore prayed that upon final hearing the defendant and its agents, servants, and employés be perpetually enjoined and prohibited from further suffering or permitting the natural gas produced in said wells or any of them to escape from them, and that the defendant be ordered and directed forthwith to securely confine the same, either by anchoring each of the wells or by confining the gas in tanks, pipes, or other proper receptacles, and that failing to do so the sheriff of Madison county be ordered to anchor, secure, and confine the natural gas in each of said wells, and that the expense of such anchoring be taxed as part of the costs of suit.

It is intimated by appellee's learned counsel that the State has no right to maintain such a suit; but whether it be on account of lack of capacity to sue or simply because the complaint does not state facts sufficient is not made plain by the argument of appellee's counsel. If it was the intention to question the capacity of the State to sue, counsel should have embraced in the demurrer the second statutory ground for demurring, namely, "that the plaintiff has not legal capacity to sue." § 342, Burns' R. S. 1894 (§ 339, R. S. 1881; *ib*, Horner's R. S. 1897).

But the courts of the State and United States are open to the State, both in its sovereign capacity and by virtue of its corporate rights, in both of which characters it sued here.

Indiana *vs.* Kentucky, 136 U. S., 479.
Indiana *vs.* Woram, 6 Hill, 33; 40 Am. Dec., 378.
State *vs.* Portsmouth Savings Bank, 106 Ind., 435.
State *vs.* Adams Express Co., 144 Ind., 549.
Adams Express Co. *vs.* Indiana, 165 U. S., 255.
State *vs.* Chicago & E. I. R. R. Co., 145 Ind., 229.
State *vs.* Union Nat'l Bank of Muncie, 145 Ind., 537.
State *vs.* Western U. Tel. Co., 146 Ind., 54.
23 Am. & Eng. Ency. of Law, p. 80.

The appell*ant* contends that "the question of the exhaustion of the gas is certain, according to the averments in both the injunction cases, and the question therefore is, Who shall be permitted to exhaust it?" "The State contends," says appell*ant*, "that the
24 manufacturers and gas companies shall be allowed that privilege for the purpose of bargain and sale, although it incidentally avers benefit to the people, and all this to the exclusion of an oil company who is also using gas for the purpose of a legitimate business. In such matters of private concern the State has no interest and should not have any."

It is true the production of oil is a legitimate business; but the

waste and destruction of natural gas, which appellee's demurrer admits it is engaged in, defiantly, constantly, and in utter contempt of the laws of Indiana and the welfare and comfort of its citizens, is not only not a legitimate business, but has been placed under the ban of two prohibitory statutes in this State. §§ 2316–2318, Burns' R. S. 1894 (Acts 1891, p. 55; Acts 1893, p. 300). Section 1 of the latter act provides "that it shall be unlawful for any person, firm, or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes or other safe receptacle for a longer period than two (2) days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other safe and proper receptacles."

The constitutionality of the latter act is assailed by the appellee; but the former act, being very much of the same nature as regards its constitutionality as the latter, was assailed by the appellant in Townsend *vs.* State, — Ind., — (47 N. E., 19), for every conceivable constitutional objection and for every objection urged to the act now under consideration, and this court in that case upheld the constitutionality of that act.

It is asserted with great confidence that the gas in or under the appellee's land is a part of the land, and that it is a reasonable use thereof to mine for the oil therein, even though gas is thereby incidentally wasted by permitting its escape into the open air, and that a statute prohibiting such a reasonable use is unconstitutional, and several Pennsylvania and Ohio cases are cited, together with one from New York and one in West Virginia, to the effect that
25 petroleum is a mineral, and while it is in the earth it is a part of the realty, and that when it reaches a well and is produced on the surface it becomes personal property and belongs to the owner of the well. It is therefore argued that natural gas is likewise a part of the land in or under which it is found, and that the owner of the land may and has a lawful right to assert absolute dominion over all that is found in or under his land to the center of the earth and for an unlimited distance upwards from the surface. The force of these authorities depends entirely upon the analogy between oil or petroleum and natural gas in or under the land. It must be confessed that there is a marked difference between these two substances in their nature. This court has likened natural gas as to its property characteristics to fish in the waters and wild game in the forest before taken and reduced to possession.

Townsend *vs.* State, *supra*, and cases there cited.

But appellee's learned counsel rely on a quotation made by this court in the latter case from the Pennsylvania supreme court and which had in a gas case been previously quoted by this court—the People's Gas Co. *vs.* Tyner, 131 Ind., 281. That quotation is as follows: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ*

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natura. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' They belong to the owner of the land and are a part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land or come under another's control the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas so that it comes into his well and under his control, it is no longer yours but his."

The part of this quotation that seems favorable to appellee's contention is this: "They (the water, gas, and oil) belong to the owner of the land and are a part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land or come under another's control the title of the former owner
26 is gone." This much of the quotation was not adopted as law by this court in either of the cases in which the quotation is found. On the contrary, in the latter case, this court said: "By the Tyner case, 131 Ind., 281, 282, this court likened natural gas and laws regulating the same to wild animals and laws regulating the taking of such animals. The supreme court of Minnesota, in State *vs.* Rodman, 58 Minn., 393, having under consideration the constitutionality of a certain game law of that State, said: 'We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common. The preservation of such animals as are adapted to consumption as food or to any other useful purpose is a matter of public interest, and it is within the police power of the State, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession;'" and this court in the same case also likened natural gas and its characteristics as property to fish and the laws regulating the taking thereof. There is no such thing in such laws, either as to wild animals or fish, to the effect that they become the property of the owner of the land on which the animals are found or in the waters of which the fish are found, and there is no such thing in such laws to the effect that after title has once vested by actual reduction to possession that the same may wander off and vest in some one else. To say that the title to natural gas vests in the owner of the land in or under which it exists today, and that tomorrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd and contrary to all the analogies of the law than to say that wild animals or fowls in "their fugitive and wan-

dering existence" in passing over the land become the property of the owner of such land, or that fish in their passage up or down
27 a stream of water become the property of each successive owner over whose land the stream passes. It is as unreasonable and untenable as to say that the air and the sunshine which float over the owner's land is a part of the land and is the property of the owner of the land. We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and therefore that the act from which we have quoted is not violative of the constitution as an unwarranted interference with private property.

But appellee's counsel contend that a proper construction of the act makes it wholly inapplicable to the subject of this suit, the prevention of the waste of gas; that it does not apply to a well unless it endangers persons or property. It is not in the language of the act that counsel claim to find this meaning, but they claim to find it in the preamble thereto, reading thus: "Whereas great danger to life and injury to persons and property is liable to result from the improper, unsafe, and negligent sinking, maintenance, use, and operation of natural gas and oil wells, therefore," etc. It is not claimed, as it cannot with reason be, that the language of the act is either ambiguous or doubtful in its meaning. It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil; and if, on review of the whole act, a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it, notwithstanding the less extensive import of the preamble. 23 Am. & Eng. Ency. of Law, 331, 332, and authorities there cited; Holbrook *vs.* Holbrook, 1 Pick., 251; Erie, etc., R. R. Co. *vs.* Casey, 26 Pa. St., 288; Yazoo, etc., C. Co. *vs.* Thomas, 132 U. S., 174; Hughes *vs.* Done, 1 Q. B. (1 A. & E. N. S.), 301.

In Yazoo, etc., Co. *vs.* Thomas, *supra*, the Supreme Court of the United States said: "The preamble to the act is referred to by counsel as sustaining their construction, because it is therein declared that the work is one 'of great public importance' and 'to be encouraged by legislative sanction and liberality,' and 'that the
28 physical difficulties of constructing and maintaining railroads to, across, along, or within either the Mississippi, Sunflower, Deer Creek, or Yazoo bottoms or basins or other alluvial lands herein referred to are such that no private company has so far been able to establish a railroad and branches, developing said basins and alluvial lands and connecting them with the railroad systems of the country;' but as the preamble is no part of the act and cannot enlarge or confer powers nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up."

We have no doubt, from the language of the act and the circum-

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stances surrounding its enactment, that the chief object in the passage thereof was to prevent the waste of natural gas.

23 Am. & Eng. Ency. of Law, 335, 336.
Edger *vs.* The Board, 70 Ind., 331.
Stout *vs.* Board, 107 Ind., 343.
May *vs.* Hoover, 112 Ind., 455.
Hunt *vs.* R. R. Co., 112 Ind., 69.

It is next contended that the act does not apply to appellee's case, because it was intended, as is claimed, to apply only to wells producing oil alone and to wells producing gas alone and not to what counsel call combination wells, producing both oil and gas, as is the case with the appellee's wells, as disclosed in the complaint. At the time of the passage of the act the chief waste of natural gas which was going on and had been for some time, as shown by the Eleventh Annual Report of the United States Geological Survey for 1889–1890 and the current history of the times, resulted from what counsel term combination wells, producing both oil and gas; the waste from wells producing gas alone was small in comparison with that from such combinations wells. In the light of these historical facts it would be extremely absurd to suppose that the legislature intended to prevent waste only by closing the spigot and leaving the bung wide open; but even the language of the statute forbids such construction. The act made unlawful by the express words of the section quoted is "to allow or permit the flow
29 of gas or oil from any such well to escape into the open air." In this sentence there is but one well spoken of. The prohibition is against the escape of gas, and it is undeniable that it is equally against the escape of oil, and it is equally clear that the prohibition against the escape of both relates to the same well, and therefore, if they are both permitted to escape from the same well, the permission of the escape of each is made unlawful by the section quoted. Had the statute made the violation thereof a crime, would any rational being contend that an indictment charging the accused with permitting both oil and gas to escape from such well would not be good? Certainly not.

It is next contended that there is no authority or right of action in the State at common law, and especially that the State cannot maintain a suit in equity, either under the statute or at common law. This being a suit in equity, as the law existed prior to the adoption of the civil code of 1852, if the objection last mentioned be well taken, it is fatal to the complaint.

The reason assigned in argument why the State cannot maintain the action for an injunction is that the statute provides a different remedy, namely, the recovery of a penalty of $200.00 for each violation of the act, and a further penalty of $200.00 for each ten days during which such violation shall continue, to be recovered in a civil action in the name of the State, for the use of the county in which such well is located, with attorneys' fees and costs of suit; and another remedy provided in another section of the act is that certain persons in the vicinity are authorized to go upon the land

where any well is situate, from which gas or oil is allowed to escape in violation of the act, and shut up the same and pack and tube said well so as to prevent the escape of gas or oil, and maintain a civil suit against the owner for the costs of such closing of said well, with attorneys' fees and costs of suit; but this court has gone much further than to hold that the fact that the civil remedy given to recover penalties and the other remedies for violations of the act does not bar the right to an injunction.

In the case of The People'- Gas Co. *vs.* Tyner, *supra*, it was said:
"No authority has been cited and we know of none support-
30 ing the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitro-glycerine within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself and not sustained by the public in general."

In that case it was held that the extraordinary equitable remedy by injunction could be invoked by a private citizen, even though the act to be enjoined was made a crime by statute; and the same rule was applied in The Columbian Athletic Club *vs.* The State, 143 Ind., 98, where this court said: "Extraordinary emergencies in many cases call for extraordinary remedies. * * * The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham, 'that it is the duty of courts in equity (and the same is true of all courts and all institutions) to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases, which, the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is no other remedy.' This rule, the author (Judge Redfield) concludes, is certainly worthy of one of the ablest, wisest, and best judges that ever administered the chancery law of England or America."

Our code provides that "whatever is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. * * * The nuisance may be enjoined or abated and damages recovered therefor" (§§ 290, 292, Burns' R. S. 1894; §§ 289, 291, R. S. 1881; *ib.*, Horner's R. S. 1897). The facts alleged in the complaint show that the acts of the appellee are such as to essentially interfere with the comfortable enjoyment of life and the property of the citizens of the State.

The supreme court of Kansas, in State *vs.* Crawford, 28 Kansas,
720, said: "Every place where a public statute is openly,
31 publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance." The demurrer to the complaint admits that the wells of the appellee are in this category.

The supreme court of California, in a suit by the attorney general

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to enjoin the Truckee Lumber Company from discharging sawdust into the Truckee river with the effect of destroying the fish therein, in sustaining the action, which is closely analagous to this action, *the court* used the following language, which we adopt: "It is alleged that the acts of the defendant have the effect of poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is 'an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or any considerable number of persons' is a public nuisance. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the State (*Ex parte* Maier, 103 Cal., 476; 42 Am. St., 129), as in England it was in the King, and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law and preserved and expressly provided for by the statutes of this and every other State in the Union. The complaint shows that by the repeated and continuing acts of defendant this public property right is being and will continue to be greatly interfered with and impaired, and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question (People *vs.* Elk River, etc., Co., 107 Cal., 219; 48 Am. St., 121). * * * The dominion of the State for the purpose of protecting its sovereign rights in the fish within its waters and their preservation for the common enjoyment of its citizens is not confined within the narrow limits suggested by the defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the State, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the
32 public fishing grounds of the State. * * * While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. * * * The fact that acts of the character alleged are by the penal code made a misdemeanor and punishable as such does not make them less a nuisance nor imply that the legislature intended to make the criminal remedy exclusive of the civil; nor is there anything in the objection that the attorney general is not privileged to maintain the action upon his own information without the intervention of a private relator." People *vs.* Truckee Lumber Co., 116 Cal., 397. The same doctrine is laid down in People *vs.* City of St. Louis, 10 Ill., 351; Commonwealth *vs.* Pittsburgh, etc., R. R. Co., 24 Pa. St., 159; State *vs.* Matschan (Ore.), 46 Pac., 791.

In the 24 Pa. St. case, *supra*, it was said: "The matter complained

of is an invasion of a public highway, and it must be enjoined against. The defendants are not allowed the excuse that this part of the canal is practically abandoned, for no neglect is chargeable against the State; its officers are insisting on its rights, and it is the merest effrontery in the defendants to set up their views of the need of the canal against the State which thought fit to make it and against the public officers who are entrusted with its custody. It is therefore ordered that an injunction issue."

The State of South Carolina brought suit in one of its courts to enjoin the Coosaw Mining Company from digging, mining, or removing phosphate rock and phosphatic deposits from the bed of the river. On petition of the mining company the case was removed into the circuit court of the United States. From the decree of that court the mining company appealed to the Supreme Court of the United States. That court, in affirming the judgment of the circuit court awarding an injunction, said: "An instructive case upon this subject is Attorney General *vs.* Jamaica Pond Aqueduct, 133 Mass., 361, 363, 364*a*. That was an information in equity in the name of the attorney general to restrain a corporation from doing certain illegal acts, the necessary effects of which would be not only to im-
33 pair the rights of the public in the use of one of the great ponds of Massachusetts for the purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores slime, mud, and offensive vegetation detrimental to the public health. It was held, upon the authority of numerous cases, American and English, that where the nuisance is a public one an information by the attorney general was the appropriate remedy. After observing that the preventive force of a decree in equity restraining the illegal acts before any mischief was done would give a more efficacious and complete remedy than an indictment or proceedings under a statute for the abatement of the nuisance, the court said: 'There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. * * * If a corporation or an individual is found to be doing acts without right the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney general to restrain and prevent the mischief.' So in Eden on Injunctions: 'The usual and perhaps the more correct mode of proceeding in equity in cases of public nuisance is by information at the suit of the attorney general,' p. 267. Mr. Justice Story said that an information in equity at the suit of the attorney general would lie in cases of purpresture and public nuisance, the jurisdiction of courts of equity being sustained because of 'their ability to give a more complete and perfect remedy than is attainable at law in order to prevent ir-

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reparable mischief, and also to suppress oppressive and vexatious litigations.' Eq. Jur., §§ 922, 923, 924; The People *vs.* Vanderbuilt, 26 N. Y., 287; District Attorney *vs.* Lynn & Boston R. R. Co., 16 Gray, 242, 245; Kerr on Injunctions, 262, 263; 1 Joyce on Injunctions, 120. These principles are applicable to the present case. The remedy at law for the protection of the State in respect to
34 the phosphate rocks and phosphatic deposits in the beds of its navigable waters is not so efficacious or complete as a perpetual injunction against interference with its rights by digging, mining, and removing such rocks and deposits without its consent. The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust for an indefinite period by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the State of the digging, mining, and removing of phosphate rock and phosphatic deposits in the bed of the Coosaw river. Such security was properly given by the decree below. Decree affirmed." Coosaw Mining Co. *vs.* South Carolina, 144 U. S., 566.

Accordingly, in Crawford *vs.* Tyrrell, 128 N. Y., 344, it was held: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained and for an injunction against the continued use of his premises in such a manner." And in Mobile *vs.* Louisville & Nashville R. R. Co., 84 Ala., 115, 126, it was held that "the mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

It has been held that the United States, in its sovereign capacity, may enjoin hydraulic mining to the detriment of navigable streams. United States *vs.* N. Bloomfield Gravel Mining Co., 81 Fed., 243.

35 In a case where the State officers failed to enforce the law against brokerage in railroad tickets the railroads brought suit in the circuit court of the United States to enjoin the brokerage business as unlawful. The circuit court of the United States for the middle district of Tennessee granted the injunction, and, in answering the objection that such a proceeding was novel and unprecedented, said: "I return, now, to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, would have prevented the enunciation of

the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled and precedent after precedent established from time to time to meet new conditions and to do full justice until the argument has long since lost most of its force, although it is still maintained in form. It has been in answer to arguments like this that the great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion, regulated by analogy, by what would be manifestly just, in view of all the existing conditions, and requiring as a condition that there is no adequate remedy at law. Beyond this the courts have not gone in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive; that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this
36 would fail to meet the demands of civilization. A similar objection that novel use was being made of the writ of injunction was pressed in the case of Toledo, A. A. & N. M. R'y Co. *vs.* Pennsylvania Co., 54 Fed., 751, and was answered by the court as follows: 'Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore in its time without a precedent. If based on sound principles and beneficent results follow their enforcement, affording relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.' Mr. Justice Brewer, sitting in the circuit court for Nebraska, said: 'I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasing complex business relations and the protection of rights can demand.' Mr. Justice Blatchford, speaking for the Supreme Court in Jay *vs.* St. Louis, 138 U. S., 1, said: 'It is one of the most useful functions of a court of equity that its methods of proceedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation.'" Nashville, C. & St. L. R'y Co. *vs.* McConnell, 82 Fed., 76. To the same effect is our own case of The Columbian Athletic Club *vs.* State, *supra*.

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It is true that, as a result of the principles announced in the previous part of this opinion, natural gas, when reduced to actual possession by the land-owner, when drawn into his well, pipes, tanks, or other receptacles, thereby becomes his personal property, subject to his dominion; but, as said by this court in People's Gas Co. *vs.* Tyner, *supra*, "the rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others."

Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the
37 complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind.

But appellee tries to excuse its conduct on the score that it cannot mine and utilize the oil under and in its land without wasting the gas; but there is nothing in the record to bear out that claim. However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the storehouse of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well-being of society than any other of the bounties of the earth.

Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom and utilize it without wasting the oil; but, even if it cannot draw oil from such wells without wasting gas and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana and, in effect, says: "It is my property to do as I please with, even to the destruction of one of the greatest interests the State
38 has, and you people of Indiana help yourselves if you can. What are you going to do about it?"

We had petroleum oil for more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State; but we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless.

We therefore conclude that the facts stated in the complaint make a case of a public nuisance, which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action; hence the circuit court erred in sustaining appellee's demurrer to the complaint.

The judgment is reversed and the cause remanded with instructions to overrule said demurrer and require the defendant to answer the complaint, and for further proceedings in accordance with this opinion.

It is therefore considered by the court that the judgement of the court below in the above-entitle- cause be in all things affirmed at the cost of the appellant, all of which is ordered to be certified to said court.

And it is further considered by the court that the appellee recover of the appellant the sum of $— for its costs and charges in this behalf expended.

39 And afterwards, to wit, on the 28th day of April, 1898, came the appellant, by counsel, and filed its petition for a writ of error to the Supreme Court of the United States in the words and figures following, to wit:

40 In the Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON County. } No. 18498.

Now comes the said The Ohio Oil Company and shows to this honorable court that heretofore, to wit, on the 5th day of June, 1897, the said State of Indiana, for the use of Madison County, filed its complaint against said The Ohio Oil Company to recover an alleged penalty for allowing natural gas to escape from certain oil wells owned by the said Ohio Oil Company in said county of Madison, in the State of Indiana, which said action was so brought and prosecuted under and by virtue of an act of the General Assembly of the State of Indiana approved March 4, 1893, which said act of the legislature, among other things, required every owner of any natural gas or oil well to confine the gas within such well within two days after the same should have been struck in the well, and that thereafter all such gas or oil should be safely and securely confined in such well, pipes, or other safe and proper receptacles; which act is in these words:

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41 An act concerning the sinking, safety, maintenance, use, and operation of natural gas and oil wells, prescribing penalties and declaring an emergency.

(Approved March 4, 1893.)

Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural gas and oil wells; therefore,

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacles for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well pipes or other safe and proper receptacles.

SEC. 2. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one-half inch as great as the hole of such well, to extend at least three feet above the salt-water level, where salt water has been struck; where no salt water has been struck such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been "shot," the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone and dry cement, so as to form a concrete up to a point at least eight feet above the top of the gas or oil bearing rock or rocks and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid, which shall be properly rammed as aforesaid. The casing from the well shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball, eight inches in diameter, shall be dropped in the well and securely rammed into the shale by the driller or owner of the well,

after which not less than one cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

42 SEC. 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which such violation shall continue; and all such penalties shall be recoverable in a civil action or actions in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and costs of suit.

SEC. 4. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section one of this act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this State against the owner, lessee, agent or manager of said well, and each of them jointly or severally to recover the costs and expense of such tubeing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

SEC. 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section two of this act, any person or corporation lawfully in possession of lands adjacent to, or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situated and take possession of such well, and plug and fill the same in the manner provided by section two of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporations so failing, jointly and severally, to recover the costs and expense of such plug-ing and filling, together with attorneys' fees and costs of suit. This shall be in additional to the penalties provided by section three of this act.

43 That in said circuit court of Madison county, Indiana, upon demurrer to said complaint, the plaintiff in error contended that said act of the General Assembly of the State of Indiana was in violation of the 14th amendment to the Constitution of the United States, in that it takes away the liberty and property of the Ohio Oil Company without due process of law, but the circuit court of Madison county adjudged the said act of the legislature of Indiana to be not in violation of said 14th amendment to the Constitution of the United States and overruled the demurrer to said complaint.

That afterwards, on the 23rd day of Nov., 1897, said The Ohio Oil Company filed its answer in said case showing that the said

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act of the legislature of Indiana was in violation of the Constitution of the United States, in this, that the enforcement of said statute operated to deprive said The Ohio Oil Company of its property, to wit, the oil in said lands and the use thereof, without due process of law, and that the production of oil was an impossibility in said lands without allowing said gas to escape; which answer was in these words:

44 "That before and at the time of the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor into the earth and rock below in said county of Madison, and that in the carrying on of said business it has expended many thousands of dollars in the leasing of territory, purchase of machinery and equipment thereof, and for the drilling of a number of wells, and for pipes and pipe lines, all of which it then owned and still owns.

The defendant admits that it drilled the well complained of herein, but says that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county, and having there no plant for that purpose, and such gas in such case being of no value to the defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized, and defendant being then and there engaged in the transportation of oil to and from the State of Indiana and among the various States in the United States.

That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same, as so constructed and operated, is not dangerous to life, health, or property.

When said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land-owner *a* stipulated royalties therefor, and so operated the same with the knowledge, approbation, and consent of such land-owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action.

That in said well and in the same strata of rock whence such such oil was produced there *was* also found at said time large quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to to raise said oil from the rock-bearing strata below the surface

45 of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in

such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed, and the people of said county and State will be deprived of use and profits of such oil, which is vastly of more value than natural gas in said well.

And the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said oil well with the highest skill.

The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring said territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no notice or knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been so expended and after said well had been so completed.

That when the act of the legislature upon which this prosecution is founded was passed there was no combination gas and oil well existing in said State, wells having subsequently thereto been developed, containing and producing both natural gas and oil, to which said statute does not apply.

That in the territory where said well complained of is situate there are a number of paying oil wells owned and operated
46 by various persons and corporations, and said field when properly developed may reasonably be expected to be a large one for the production of oil, which will be and is of very large value to the people of said county.

Wherefore defendant prays judgment for its costs and all other proper relief."

47 But the said circuit court of Madison county, Indiana, on the 26th day of Nov., 1897, sustained the demurrer to said answer and rendered judgment against said The Ohio Oil Company for the penalty provided by said statute, to wit, in the sum of five hundred dollars. From said judgment of said circuit court said The Ohio Oil Company appealed to the supreme court of Indiana, in which last-named court, on the 16th day of March, 1898, the said supreme court of Indiana affirmed the judgment of the said Madison circuit court, and held and decided that the said act of the General Assembly of the State of Indiana was constitutional in all respects; that said statute was valid and did not deprive the plaintiff in error of liberty or property without due process of law.

And your petitioner shows to this honorable court that the said several judgments and decrees of said circuit court and of the said supreme court of the State of Indiana are manifestly erroneous in deciding that the said statute of the State of Indiana does not deprive the plaintiff in error of liberty and property without due process of law, and it therefore prays that this honorable court issue

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its writ of error directed to the honorable the judges of the supreme court of the State of Indiana, requiring them, the said judges, to send up to the Supreme Court of the United States a complete record of the said cause.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Ohio Oil Company.

48 And be it further remembered that on the same day said petition was granted and said writ of error allowed as prayed for by the order of the Honorable Timothy E. Howard, chief justice of said court, made and entered in said cause in these words:

"Allowed by Timothy E. Howard, chief justice of the supreme court of Indiana."

49 And on the same day came the appellant, by counsel, and filed its certificate of the chief justice of the supreme court of Indiana in the words and figures following, to wit:

50 STATE OF INDIANA, *ss:*

In the Supreme Court of Indiana.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON COUNTY. } No. 18498.

I, Timothy E. Howard, chief justice of the supreme court of Indiana, do hereby certify that in the above and foregoing cause, wherein final judgment was rendered in the supreme court of Indiana on the 16th day of March, 1898, that in said cause there was involved, discussed by counsel, and decided by this court the question whether the act of the General Assembly of the State of Indiana, approved March 4, 1893, entitled "An act concerning the sinking, safety, maintenance, use, and operation of natural gas and oil wells, prescribing penalties and declaring an emergency," was in violation of the 14th amendment to the Constitution of the United States, and that in such decision the supreme court of the State of Indiana in the cause aforesaid and at the time aforesaid held and decided that the said act of the General Assembly was a valid statute, and that the same was not in conflict with the 14th amendment to the Constitution of the United States.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court the 28th day of April, 1898.

TIMOTHY E. HOWARD,
[SEAL.] *Chief Justice.*

51 And on the same day came the appellant, by counsel, and filed its citation and service in the words and figures following, to wit:

52 UNITED STATES OF AMERICA:

To the State of Indiana, for the use of Madison County, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Indiana in a cause wherein The Ohio Oil Company is the plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Timothy E. Howard, chief justice of the supreme court of Indiana, this 28th day of April, in the year of our Lord 1898.

TIMOTHY E. HOWARD,
Chief Justice.

Service of foregoing citation is hereby acknowledged.
April 28, 1898.

W. A. KETCHAM,
Attorney General of Indiana.

MERRILL MOORES,
Of Counsel for the State.

53 And on the same day came the appellant, by counsel, and filed its appeal bond herein in the words and figures following, to wit:

54 In the Supreme Court, *ss:*

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON COUNTY. } 18498.

Know all men by these presents that the undersigned, The Ohio Oil Company, as principal, and George Shirts, as surety, are held and firmly bound unto the State of Indiana, for the use of Madison County, in the sum of twelve hundred ($1,200) dollars, upon the following conditions:

That whereas on the twenty-sixth day of November, 1897, the Madison circuit court in the above entitled cause rendered judgment against the said The Ohio Oil Company in the sum of five hundred ($500) dollars and costs, upon which said judgment said The Ohio Oil Company appealed to the supreme court of Indiana, in which last-named court, on the sixteenth day of March, 1898, said judgment was affirmed; upon which several judgments said The Ohio Oil Company has prayed a writ of error to the Supreme Court of the United States:

If said The Ohio Oil Company shall well and truly prosecute its said writ of error and shall pay any judgment that may be rendered or affirmed against it in the Supreme Court of the United

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States, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Witness our hands and seals this 28th day of April, 1898.

THE OHIO OIL COMPANY.
GEORGE SHIRTS.

Taken and approved by me this 28th day of April, 1898, Timothy E. Howard, chief justice of the supreme court of Indiana.

TIMOTHY E. HOWARD,
Chief Justice.

55 And on the 16th day of May, 1898, came appellant, by counsel, and filed its writ of error herein in the words and figures following, to wit:

56 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said supreme court, before you, between The Ohio Oil Company and The State of Indiana, for the use of Madison County, a manifest error hath happened, to the great damage of the said Ohio Oil Company, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said [SEAL.] circuit court this 16 day of May, A. D. 1898.

NOBLE C. BUTLER, *Clerk.*

57 And on the same day appellant, by counsel, filed its assignment of errors to the Supreme Court of United States, together with a joinder therein by appellee, in the words and figures following, to wit:

58 In the Supreme Court.

THE OHIO OIL COMPANY, Plaintiff in Error,
vs.
THE STATE OF INDIANA, for the Use of MADISON COUNTY, Defendant in Error.

Now comes said The Ohio Oil Company, plaintiff in error in the foregoing cause, and shows that there is manifest error in the above and foregoing proceedings and judgment and decree of the circuit court of the county of Madison, in the State of Indiana, and of the supreme court of the State of Indiana, in this, to wit:

1.

The circuit court of the said county of Madison erred in overruling the demurrer filed by the plaintiff in error to the first paragraph of the complaint.

2.

The circuit court of the county of Madison, in the State of Indiana, erred in overruling the demurrer filed by the plaintiff in error to the second paragraph of the complaint.

3.

The circuit court of the county of Madison, in the State of Indiana, erred in sustaining the demurrer filed by the defendant in error to the answer of the plaintiff in error.

4.

The supreme court of the State of Indiana erred in holding that the first paragraph of the complaint in this action stated facts sufficient to constitute a cause of action.

59 5.

The supreme court of the State of Indiana erred in deciding that the second paragraph of the complaint in this cause stated facts sufficient to constitute a cause of action.

6.

The supreme court of the State of Indiana erred in deciding that the answer filed by the plaintiff in error did not state facts sufficient to constitute a defense to said cause of action.

7.

The supreme court of Indiana erred in deciding that the act of the General Assembly of the State of Indiana approved March 4, 1893, entitled "An act concerning the sinking, safety, maintenance, use, and operation of natural gas and oil wells, prescribing penalties and declaring emergencies," was a valid and constitutional enactment.

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8.

The supreme court of the State of Indiana erred in deciding that the said act of the legislature of the State of Indiana, approved March 4, 1893, was not in violation of the 14th amendment to the Constitution of the United States, and erred in holding that said statute did not deprive the plaintiff in error of liberty and property without due process of law.

Wherefore the plaintiff in error prays that the said judgment and decree respectively of the circuit court of Madison county, in the State of Indiana, and of the supreme court of the State of Indiana, be in all things reversed and set aside, and that this cause be remanded to the supreme court of the State of Indiana, with instructions respectively to sustain the demurrer to each paragraph of the complaint and to overrule the demurrer to the answer, and the plaintiff in error prays for such further and other orders as may to this court seem proper in the premises.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Att'ys for Ohio Oil Company.

60 The defendant in error, The State of Indiana, for the use of Madison County, says there is not error in the proceedings and judgment in said cause.

W. A. KETCHAM,
Attorney General of Indiana.

MERRILL MOORES,
Of Counsel for the State.

61 STATE OF INDIANA:

Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of Madison County. } Madison C. C. No. 18498.

I, Alexander Hess, clerk of the supreme court of the State of Indiana, hereby certify that the above and foregoing transcript contains full, true, and complete copies of the record and of all the papers, entries, proceedings, and judgment in the above-entitled cause, together with a full, true, and complete copy of the opinion of said supreme court in this cause and a full, true, and complete copy of the opinion of the said supreme court referred to in the opinion in this cause as the one upon which the decision in the above-entitled cause is based; also of the petition for a writ of error, allowance thereof by the chief justice of said court, assignment of errors, joinder, writ of error, citation and service, and appeal bond to the Supreme Court of the United States.

In witness whereof I hereunto set my hand and affix the seal of said court, at my office, in Indianapolis, this 20th day of May, 1898.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ALEX. HESS,
Clerk Supreme Court.

Endorsed on cover: Case No. 16,892. Indiana supreme court. Term No., 308. The Ohio Oil Company, plaintiff in error, *vs.* The State of Indiana, for the use of Madison County. Filed May 27th, 1898.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 329 84.

THE OHIO OIL COMPANY, PLAINTIFF IN ERROR,

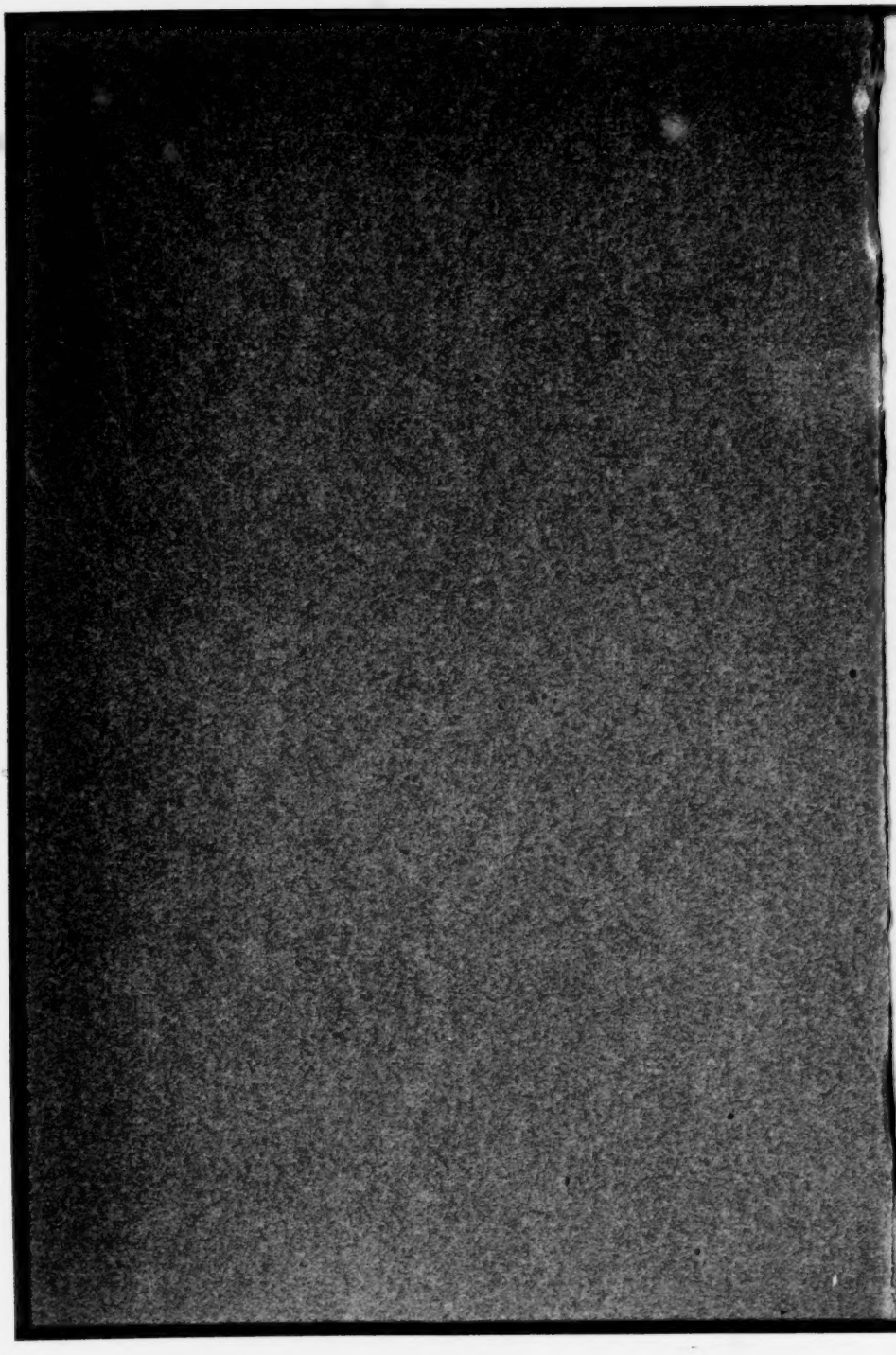
vs.

THE STATE OF INDIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED MAY 27, 1898.

(16,893.)



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(16,893.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 309.

THE OHIO OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1898.

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a On the 21st day of April, 1898, M. F. Elliott and Stephenson, Shirts & Fertig, attorneys for the appellant, The Ohio Oil Company, filed in the clerk's office of the supreme court of Indiana the following præcipe in words and figures, to wit:

THE STATE OF INDIANA:

In Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA. } No. 18600.

The clerk will please make out complete transcript in above cause, including copy of opinion referred to as the one upon which this cause is decided.

April 21, 1898.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Att'ys for Appellant.

1 STATE OF INDIANA, *ss*:

Supreme Court.

Be it remembered that heretofore, to wit, on the 20th day of April, 1898, the Ohio Oil Co., by its attorneys, M. F. Elliott and Stephenson, Shirts & Fertig, filed in the office of the clerk of the supreme court of Indiana a transcript of the record and proceedings of the Madison circuit court of said State, wherein said State of Indiana was plaintiff and The Ohio Oil Company was defendant, together with an assignment of errors, joinder, and agreement to submit endorsed thereon; which transcript, assignment of errors, joinder, and agreement to submit are in the words and figures following, to wit:

2 Pleas before the Honorable John F. McClure, sole judge of the Madison circuit court of the county of Madison, in the State of Indiana, at a term begun, held, and continued in the court-house, in the city of Anderson, commencing on the first Monday in March, 1898.

Transcript.

No. 13018.

Be it remembered that heretofore, to wit, on the 12th day of March, 1898, the same being one of the judicial days of the March term, 1898, of the Madison circuit court of the county of Madison, in the State of Indiana, the following proceedings were had in the cause entitled as follows, to wit:

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STATE OF INDIANA
vs.
THE OHIO OIL COMPANY.

Comes now Daniel W. Scanlan, prosecuting attorney, and files an amended complaint herein in the words and figures following, to wit:

Amended Complaint.

STATE OF INDIANA, *Madison County,* } *ss:*

THE STATE OF INDIANA
vs.
THE OHIO OIL COMPANY.

The plaintiff complains of the defendant by way of amended complaint, and plaintiff says that for many years heretofore there has existed, underlying the counties of Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells, and other counties of the State of Indiana, a large subterranean deposit of natural gas, occupying a reservoir of large extent, with well-defined bound-ries, and utilized for fuel and light by the people of those coun-
3 ties and many other counties and cities of Indiana, including Indianapolis, Ft. Wayne, Richmond, Logansport, Anderson, Muncie, Marion, Kokomo, and others of the most populous cities of said State, to which cities said gas is conducted, after being brought to the surface of the earth, through pipes and conduits, by means of which many hundreds of thousands of the people of the State of Indiana are now, and have been for more than ten years last past, continuously supplied with gas for light and fuel; that said natural gas, underlying the counties aforesaid and other portions of the State, is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir in which the gas is confined under great pressure and from which it escapes, when it is permitted to do so, with great force.

Amended complaint.

The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural-gas deposit to the State and to its citizens is many millions of dollars; that since the discovery of said gas deposit in 1886 immense sums of money have come into the State and have been invested in large manufacturing interests, and other vast sums of money belonging to the people of the State of Indiana have been invested in similar enterprises, causing a great increase in the population, principally in the territory underlying which said gas is found. Many cities in and adjacent to the gas territory, including those named, are wholly dependent for fuel upon natural gas, and for that reason the people of the State of Indiana have become and are interested in the protection and continued preservation of the natural-gas supply; that many millions of dollars invested in manufacturing and other properties in and near said gas territory are wholly dependent for their con-

tinued preservation and for the permanent value of their property upon said natural-gas supply; that their location and establishment in said gas territory was due to the presence of natural gas underlying the same, without which such enterprises could not operate at a profit, and that in that event the supply of gas should be exhausted in said territory many of such manufacturing enter-
4 prises, in which thousands of the citizens of Indiana find employment at remunerative wages, will be compelled to stop operation.

That their employés will be thereby thrown out of employment, and many of them, being dependent upon their labor for support, may and will become charges upon the State and its several municipal subdivisions; that the property of said manufacturing enterprises and the vast investments depending upon them and related to them will become worthless and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now interested in said enterprises as aforesaid.

That in the cities named and in all the territory known as the "gas belt" the inhabitants have for years used practically no other fuel than natural gas; that their houses have, in
Complaint. many instances, *are* constructed with a view to the use of such fuel, and will have to be differently equipped before other kinds of fuel can be used; that the cost of natural gas as fuel to the people of the "gas belt," who number several hundreds of thousands, is very much less than that of any other fuel that has ever been or can be procured by them, and that to the other inhabitants of the State using said natural gas it has become and is a source of great convenience, comfort, and increased happiness because of its cheapness, convenience, and cleanliness as fuel.

That many small villages in and near the gas territory have within a few years become flourishing and opulent cities.

That the State's wealth and its revenues derived from taxation on account of such increased population and the various interests that have been fostered and supported by natural gas have been greatly increased, and will in the event natural gas gives out be correspondingly curtailed.

That the State of Indiana, relying upon the permanent supply of natural gas, has at great expense equipped many of its public institutions, including the State-house, the Central and other hospitals for the insane, the asylums for the blind and deaf and dumb, the institution for the care of orphans of American soldiers,
5 and other public institutions owned and maintained by the State of Indiana and its various municipal subdivisions, together with the court-houses in many counties, and a vast number of public schools, for the use of natural gas as a fuel, by which the cost of maintaining the public buildings and institutions above-named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased.

That the supply of natural gas underlying the
Complaint. territory aforesaid is so placed in such Trenton rock that the diminution or consumption of said gas

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taken from said reservoir affects and reduces correspondingly the common supply.

That if the gas supply is husbanded and protected it will last for many years and continue to furnish the various cities named with abundant fuel, and the population, wealth, and other material interests of the State will continue to be benefitted and enhanced and the comfort, happiness, and enjoyment of the people of the State greatly increased.

That underlying a portion of said natural-gas territory and at the same levels, occupying the interstices — said Trenton rock in common with said gas, are large quantities of petroleum oil; and that, because of the volatile character of said gas and the pressure under which it is confined in said Trenton rock when said reservoir is tapped by wells drilled into the same from the surface of the earth, said gas and oil will and do escape into the open air in great volumes, unless securely confined in tanks or other proper receptacles.

That on or about the 25th day of May, 1897, said defendant, The Ohio Oil Company, drilled, near the city of Alexandria, in said Madison county, a number of wells into said gas and oil bearing rock, producing natural gas and petroleum as aforesaid in large quantities, which wells are known by the name of the land-owner upon whose land they are situated, which name and the description of said wells are as follows, to wit:

Blake well No. 1, the northwest quarter of section 16, town-
6 ship 21 north, range 7 east; Blake well No. 2, located upon the same land about ten rods east of said last-named well; Blake well No. 3, located about fifteen rods north of said first-named well; Blake well No. 4, located about ten rods south of said Blake well No. 1, and Blake well No. 5, situated upon said land near the wells above described, the precise location of which is to plaintiff unknown.

That instead of securely anchoring said wells and each of them when so drilled so as to confine within the same or within tanks or pipes or other safe receptacles the natural gas produced therefrom within two days after said wells were respectively
Complaint. completed and gas and oil was struck therein, the said defendants, ever since the completion of said wells, all of which have been completed for periods varying from four to nine months, have unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas *has* been greatly diminished, and the property of its citizens in and near said gas territory dependent upon the continued supply of said natural gas for fuel as aforesaid has been greatly damaged and decreased in value.

That the defendants and each of them avow their purpose to permit said gas to escape continuously and indefinitely hereafter from such wells and refuse to make any effort to confine the same, but declare their purpose to drill other wells in said gas territory and permit the gas therefrom to flow and escape into the open air, and that if said gas continues to flow from said wells the supply of natural gas

upon which the citizens of said State depend as aforesaid will be greatly diminished; that the pressure of said gas as found in said Trenton rock will be greatly diminished, and that by the diminution of said pressure water will accumulate in said rock stratum and ultimately entirely displace and overcome said gas supply.

Plaintiff therefore says that because of the wrongful acts of defendants above described, heretofore committed and now continuing, its property and that of its citizens has been and will
7 continue to be essentially interfered with and the comfortable enjoyment of the lives of its citizens greatly interrupted.

And plaintiff avers that it has no adequate remedy at law for the redress of its grievances herein complained of; that it is impossible accurately to fix in dollars and cents the damages plaintiff has sustained and will sustain by reason of the wrongful and unlawful acts of the defendants aforesaid, if suffered to continue, and that plaintiff's injuries on account thereof will be great and irreparable and increase as said gas is permitted to flow and the number of wells wherein the same is unconfined continues to
Complaint. increase; that the ordinary remedies provided by statute, though plaintiff has repeatedly resorted thereto, have proved ineffectual to restrain or check the wrongful action of said defendant aforesaid.

That the penalties provided by law for the wrongful acts above described are wholly inadequate, and that the defendants have openly defied and continue to defy the lawfully constituted authorities of the State in their efforts to enforce and recover in the name of the State the penalties provided by law for said wrongful acts so committed by the defendants; that injunctive relief is necessary in order to restrain the continued wrongful acts of the defendants aforesaid, and that unless the same is given one of the greatest natural resources of the State will ultimately and in the near future be destroyed.

That, in order to secure even partial and inadequate damage for the wrong so done, a multiplicity of suits must be resorted to, involving great expense and affording no considerable relief, unless the defendants are restrained and prohibited from doing the things herein complained of.

That the value of the gas wasted by permitting said several wells to remain open each day is of great value, and that, in addition to the value of the same, the whole gas territory or field is greatly damaged by permitting said wells to remain open, in that what is known as "back pressure," resulting from the confinement
8 of said gas, is in a great measure relieved and destroyed when said gas is liberated in the manner aforesaid, and that said back pressure is necessary throughout said field in order to prevent the flow of water into said rock stratum and the consequent displacement of the gas therein contained; that, for the protection of said gas supply from the invasion of salt water, it is necessary that in the use of gas from wells drilled into said reservoir only a fraction of the entire volume of said wells should be used, to the end that the back pressure shall be maintained at as high a pressure as

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possible, and that any other or freer method of using said gas has a tendency to expose the same to danger of salt water, as aforesaid.

Complaint. That if said wells are permitted to flow until a final determination of this cause the purpose of this suit will be in a great measure defeated and the supply of gas wholly or in a great part exhausted before the remedy can be applied; that great and irreparable damage will result and immense loss be occasioned if said wells are permitted to flow until a hearing can be had upon this application, either for a permanent or temporary injunction, and notice given to the defendant thereof.

And plaintiff therefore prays that a temporary order issue forthwith from this court prohibiting, restraining, and enjoining said defendant, its agents, servants, and employés, from further suffering or permitting the natural gas produced in said wells or any of them or any part thereof to longer escape therefrom, and that said defendant be ordered, directed, and commanded forthwith to securely confine the same either by anchoring each of said wells or by confining the gas produced therefrom in tanks, pipes, or other proper receptacles, and that failing or refusing so to do the sheriff of Madison county be ordered and directed forthwith to procure necessary materials and labor and thereby anchor, secure, and confine the natural gas produced from said wells and each of them, and that the expense of so doing be taxed as part of the costs of this suit.

And the plaintiff further prays that upon the final hearing
9 of this cause said defendant company, its officers, servants, agents, and employés, be perpetually enjoined and prohibited from further suffering said gas to escape, and that they be forever thereafter commanded to confine said gas safely and securely in pipes, tanks, or other proper receptacles, and for all proper relief.

W. A. KETCHAM,
Attorney General.
DANIEL W. SCANLAN,
Prosecuting Attorney.

C. C. SHIRELY,
MERRILL MOORES, *Of Counsel.*

Complaint.

STATE OF INDIANA, }
Madison County, } ss:

Before me, a notary public in and for said county and State, personally appeared Joshua C. Leach, who, being duly sworn according to law, says that he is the duly and legally appointed, qualified, and acting natural-gas supervisor for the State of Indiana, and that as such it is a part of his official duty to see that the laws of the State of Indiana appertaining to the drilling of wells and the piping and consumption of natural gas are faithfully carried out, and that the penalties for violating the same are strictly enforced.

And he further says that the facts stated in the foregoing complaint are true as he verily believes, and that he makes this affidavit

for and on behalf and at the request of the State of Indiana and its lawfully constituted authorities herein.

JOSHUA C. LEACH.

Subscribed and sworn to before me this 11th day of March, A. D. 1898.

WILLIAM B. FOLEY,
Notary Public.

[SEAL.]

10 The court, being well advised in the premises, grants temporary injunction herein upon the plaintiff filing its undertaking with George C. Foley as surety thereon; which undertaking is filed and approved by the court.

It is therefore ordered that the defendant, its officers, agents, and employés, be, and they are hereby, restrained and prohibited from further suffering or permitting natural gas to escape from any of the wells heretofore drilled by it in the county of Madison and State of Indiana, mentioned in the complaint, which wells are particularly located and described, together with the name of the land owner upon whose land the same are situated, as follows, to wit, Blake well No. 1, the northwest quarter of section 16, township 21 north, range 7 east; Blake well No. 2, located upon the same land about ten rods east of said first-named well; Blake well No. 3, located about fifteen rods north of said first-named well; Blake well No. 4, located about ten rods south of said Blake well No. 1, and Blake well No. 5, situated upon said land near the wells above described, the precise location of which is to plaintiff unknown; and the said defendant is hereby ordered and commanded forthwith securely to confine and anchor said wells and each of them or otherwise to confine said gas produced therefrom in tanks or other safe and proper receptacles, so that the same nor any part thereof shall not escape.

Restraining order.

Upon the failure of the sheriff of this court to find within his bailiwick any proper officer or agent of the defendant company upon which to serve this writ, or upon failure and refusal of said defendant company, by its proper agents and officers, to immediately confine said gas and protect the same from further waste, as aforesaid, upon the service of a copy of this order, then the said sheriff is hereby directed and commanded to procure the necessary material and labor and forthwith proceed to anchor and confine said wells and each of them, so as to secure the gas produced therefrom and confine the same therein.

11 Afterwards, to wit, on the 2nd day of April, 1898, the same being the 24th judicial day of the March term, 1898, of the Madison circuit court, Indiana, the following further proceedings were had in the cause entitled as follows, to wit:

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STATE OF INDIANA
vs.
OHIO OIL COMPANY.

Come the parties, and the defendant now files its demurrer to the amended complaint herein; which demurrer is in the words and figures following, to wit:

Demurrer to Complaint.

STATE OF INDIANA, } *ss:*
Madison County, }

THE STATE OF INDIANA
vs.
THE OHIO OIL COMPANY.

The defendant, The Ohio Oil Company, demurs to the amended complaint herein, and for cause of demurrer says that the same does not state facts sufficient to constitute a cause of action.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Defendant.

Overruled.

And the court, being sufficiently advised, now overrules the defendant's demurrer to the amended complaint; to which ruling the defendant now excepts, and, being ruled by the court to answer, the defendant now files its answer in the words and figures following, to wit:

12 *Answer.*

STATE OF INDIANA, } *ss:*
Madison County, }

THE STATE OF INDIANA
vs.
THE OHIO OIL COMPANY.

Now comes the defendant, The Ohio Oil Company, and for its answer to the complaint herein says it is a corporation duly organized under the laws of Ohio and duly complied with all the laws of Indiana with respect to doing business in this State before the bringing of this suit; that this action is prosecuted under and by virtue of an act of the General Assembly of the State of Indiana approved March 4th, 1893; which said act is in these words:

"An act concerning the sinking, safety, maintenance, use, and operation of natural gas and oil wells, prescribing penalties and declaring an emergency.

(Approved March 4, 1893.)

Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sinking,

maintenance, use and operation of natural gas and oil wells; therefore,

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles.

SECTION 2. Whenever any well shall have been sunk for
13 the purpose of obtaining natural gas or oil, or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been 'shot' there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one-half inch as great as the hole of such well, to extend at least three feet above the salt-water level, where salt water has been struck; where no salt water has
Answer. been such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with the diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been 'shot,' the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone and dry cement, so as to form a concrete up to a point at least eight feet about the top of the gas or oil bearing rock or rocks and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid. The casing from the well shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball eight inches in diameter shall be dropped in the well and securely rammed into the shale by the driller or owner of the well, after which not less than one cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

14 SECTION 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which such violation shall continue; and all such penalties shall be recoverable

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in a civil action or actions in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and costs of suit.

SECTION 4. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon

Answer. the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section one of this act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in the State against the owner, lessee, agent or manager of said well, and each of them jointly and severally to recover the cost and expense of such tubing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

SECTION 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section two of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well, and plug or fill the same in the manner provided by section two of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporation so failing, jointly and severally, to recover the costs and expenses of such plugging and filling, together with attorneys' fees
15 and costs of suit. This shall be in addition to the penalties provided by section three of this act."

This defendant, further answering, says that before and at the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock below in said county of Madison, and that in the carrying on of said business it has expended many thousands of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells and for pipes and pipe lines, all of which it then owned and still owns.

The defendant admits that it drilled the well complained of herein, but says that said well was so drilled in good

Answer. faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county, and having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country

and remote from any dwelling, and the same as so constructed and operated is not dangerous to life or property.

That said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land-owner the stipulated royalties therefor, and so operated the same with knowledge, approbation, and consent of such land-owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action; all of which was so done under and by virtue of a lease to defendant by the owner of said land granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

16 That in said well and in the same strata of rock whence such oil was produced there *was* also found at said time quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as

Answer. may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed and the people of said county and State will be deprived of the use *of the use* and profits of such oil, which is vastly of more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

The defendant further alleges that for many months before the completion of said well it was openly and public- engaged in acquiring territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no notice or knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been so expended and after said well had been so completed.

17 That in the territory where said well complained of is situated there are a number of paying oil wells, owned and operated by various persons and corporations, and said field when

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properly developed may reasonably be expected to be
Answer. a large one for the production of oil, which will be and is of great value to the people of said county.

This defendant further alleges that said act of the General Assembly of the State of Indiana, as above set out, violates the fourteenth amendment of the Constitution of the United States in this, that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the laws.

Wherefore defendant prays judgment for its costs and all other proper relief.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Defendant.

And the plaintiff now files its demurrer to the answer in the words and figures following, to wit:

Demurrer to Answer.

STATE OF INDIANA, } ss:
Madison County, }

Madison Circuit Court.

THE STATE OF INDIANA }
vs. }
THE OHIO OIL COMPANY. }

The State of Indiana demurs to the answer of the Ohio Oil Company upon the ground that the answer does not state facts sufficient to constitute a cause of defense.

W. A. KETCHAM,
Attorney General.

MERRILL MOORES,
C. C. SHIRELY,
Of Counsel for the State of Indiana.

18 And the court, being fully advised, now sustains plaintiff's demurrer to the answer; to which ruling the defend-
Sustained. ant now excepts, and the court now rules the defendant to answer, which the defendant refuses to do, electing to stand upon its answer heretofore filed and the ruling of the court sustaining plaintiff's demurrer thereto; and the court, being sufficiently advised, does now find that the facts stated in the complaint are true, and that defendant is the owner of certain gas and oil wells in Madison county, Indiana, described as follows, to wit:

Blake well No. 1, located in the northwest quarter of section number sixteen (16), in township twenty-one (21) north,
Judgment. range number seven (7) east; Blake well No. 2, located upon the same land about ten rods east of said last well; Blake well No. 3, located upon the same land about fif-

teen rods north of said first-named well; Blake well No. 4, located upon the same land about ten (10) rods south of the first-named well; Blake well No. 5, situated upon or near the wells above described.

That at the time the complaint was filed the same were completed and produced both natural gas and petroleum oil; that the defendant, which is a corporation, was control-ing and operating said wells, and that since about the 25th day of May, 1897, said defendant had suffered and permitted large volumes of natural gas to escape from said wells and from each of them into the open air without any effort whatever to prevent said escape and without confining the same or any part thereof in said wells or in tanks, pipes, or other safe receptacle-, whereby great and irreparable damage has been and is being done to the State of Indiana and the citizens thereof, all as alleged in the plaintiff's complaint.

It is therefore considered, adjudged, and decreed by the court that the defendant be, and it is hereby, perpetually enjoined, restrained, and prohibited from hereafter suffering or permitting any natural gas to escape from said wells or either of them into the open air, and said defendant company is hereby ordered forthwith to
19 safely confine all gas produced and issuing from said wells therein or in proper pipes, tanks, or other safe receptacle-, so that no part of the same shall hereafter escape.

And the sheriff of Madison county is hereby ordered and directed, in the event that said defendant shall fail or refuse to comply with this order and decree, to produce all necessary ma-
Judgment. terials and labor and property and securely anchor said wells and each of them and confine therein or in such proper pipes and tanks as may be necessary to securely confine the same all natural gas produced by said wells.

The cost and expense of doing such work to be taxed as a part of the costs of this suit.

And it is further adjudged that the plaintiff have judgment against the defendant in the sum of ten dollars and costs taxed at — dollars.

Certificate.

STATE OF INDIANA, } ss:
Madison County, }

In the Madison Circuit Court.

STATE OF INDIANA }
vs.
THE OHIO OIL COMPANY. }

I, Edmund Johnson, clerk of the Madison circuit court of the county of Madison, in the State of Indiana, hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the order-book entries, papers and pleadings, rulings of the court, and the objections and exceptions thereto in the above-entitled cause, as the same appear of record and on file in my office.

In testimony whereof I have hereunto affixed the seal of said

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court and subscribed my name, at Anderson, Indiana, this 18th day of April, 1898.

[SEAL.] (Signed) EDMUND JOHNSON, *Clerk.*

20 *Assignment of Errors.*

THE STATE OF INDIANA:

In Supreme Court.

THE OHIO OIL COMPANY, Appellant,
vs.
THE STATE OF INDIANA, Appellee.

Now comes the appellant, The Ohio Oil Company, and says there is manifest error in the foregoing proceedings and judgment in this, namely:

1. The court erred in overruling the demurrer to the amended complaint.

2. The court erred in sustaining the demurrer to the answer.

For which errors appellant prays the judgment be in all things reversed.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Appellant.

Joinder.

The appellee says there is no error in the record.

W. A. KETCHAM,
Attorney General.

MERRILL MOORES,
C. C. SHIRLEY, *Of Counsel.*

Agreement to Submit.

It is agreed that this case may be submitted.

W. A. KETCHAM, *Attorney General.*
M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Att'ys for Appellant.

C. C. SHIRLEY,
MERRILL MOORES,
For the State.

21 And on April 20, 1898, appellant, by counsel, files its brief in the above-entitled cause.

And on the same day appellee, by its counsel, files a brief in the same entitled cause.

And thereafter appellant's counsel file a motion to advance the cause and joinder.

And on April 21, 1898, the cause was advanced.

And on April 21, 1898, the same being the 130th judicial day of

the November term, 1897, the court, being advised in the premises, affirms the above-entitled cause, with an opinion *per curiam* as follows:

Opinion.

THE OHIO OIL CO. *vs.* THE STATE OF INDIANA. } No. 18600.

From the Madison circuit court.

The questions presented by the record in this case were fully considered and decided against the contention of the appellant herein in the case of The State of Indiana *vs.* The Ohio Oil Co., — Ind., —; 49 N. E. Rep., 809, and on the authority of the decision in that case the judgment herein is affirmed.

21½ It is therefore considered by the court that the judgment of the court below in the above-entitled cause be in all things affirmed at the cost of the appellant; all of which is ordered to be certified to said court.

It is further considered by the court that the appellee recover of the appellant the sum of $— for his costs and charges in this behalf expended.

22 THE STATE OF INDIANA *vs.* THE OHIO OIL CO. } No. 18476.

From the Madison circuit court.

McCABE, *J.*

The State of Indiana, by her attorney general and the prosecuting attorney in the Madison circuit court, brought suit against the appellee, The Ohio Oil Company, seeking to enjoin it from wasting natural gas.

The circuit court sustained the defendant's demurrer to the complaint for want of sufficient facts to constitute a cause of action, and, the plaintiff electing to abide said demurrer and refusing to amend its complaint or to plead further, the court rendered judgment that the plaintiff take nothing by its complaint, and that defendant recover costs. Upon this ruling alone the State assigns error.

The substance of the complaint is that for many years heretofore there has been underlying Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells, and other counties in Indiana a large deposit of natural gas, utilized for fuel and light by the people of those counties and of many other counties and cities in Indiana, including Indianapolis, Ft. Wayne, Richmond, Logansport, Lafayette, and others of the most populous cities of the State, to which cities the gas is conducted, after being brought through wells to the surface of the ground, by pipes and conduits, by means of which many hundreds of thousands of the people of Indiana are

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supplied with gas for light and fuel. The natural gas underlying the counties named and other portions of Indiana is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir in which the gas is confined under great pressure and from which it escapes, when permitted to do so, with great force. The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural-gas deposit to the State and its citizens is many millions of dollars. Since the discovery of the gas deposit in 1886 vast sums of money have come into the State and have been invested in building up large manufacturing interests, and vast sums of
23 money belonging to the people of Indiana have been invested in similar enterprises, causing a great increase of population, principally in the territory underlying which gas is found. Many cities in and adjacent to the gas territory, including those named, are almost wholly dependent for fuel supply upon natural gas, and for that reason the people of Indiana have become and are greatly interested in the protection and continued preservation of the gas supply. Many millions of dollars invested in manufacturing and other properties in and near the gas territory are wholly dependent for their continued operation and for the permanent value of their property upon the gas supply. Their location and establishment in the gas territory was due to the presence of natural gas underlying it, without which such enterprises could not be operated at a profit, and in the event that the supply of gas is exhausted in the territory many of such manufacturing enterprises (in which thousands of citizens of Indiana find employment at remunerative wages) will be compelled to suspend operations. Their employés will be thrown out of employment and many of them, being wholly dependent upon their labor for support, may and will become charges upon the State and its municipal subdivisions. The property of the manufacturing enterprises and the vast investments depending on them and related to them will become worthless and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now invested in these enterprises. In the cities named and in all the territory known as the "gas belt" the inhabitants have for years used practically no other fuel than natural gas. Their houses in many instances are constructed with a view to the use of natural gas and will have to be differently equipped before other kinds of fuel can be used. The cost of natural gas as fuel to the people in the gas belt, who number several hundreds of thousands*m*, is very much less than that of any other fuel that has ever been or can be procured by them, and to the other inhabitants of the State using natural gas it has become and is a source of great convenience, comfort, and increased happiness because of its cheapness, convenience, and cleanliness as fuel. Many small villages in and near the gas territory have within a few years become flourishing and opulent cities. The State's wealth and its revenues derived from taxation on account of such increased population and the various interests
24 that have been fostered and supported by natural gas *ah*ve been greatly increased, and will, in the event gas is ex-

hausted, be correspondingly curtailed. The State of Indiana, relying upon the permanent supply of gas, has, at great expense, equipped many of its public institutions, including the state-house, the Central and other hospitals for the insane, the asylums for the blind and deaf and dumb, the Institution for the Care of the Orphans of American Soldiers and Sailors, and other public institutions owned and maintained by the State of Indiana and its various subdivisions, together with the court-houses in many counties and a vast number of public schools, for the use of natural gas as fuel, by which the cost of maintaining the public buildings and institutions named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased. Natural gas exists in large reservoirs, or a series of reservoirs connected with each other, underlying the gas territory, and the diminution or consumption of natural gas taken from any part of them affects or reduces correspondingly the common supply. If the gas supply is accordingly husbanded and protected it will last for many years and continue to supply the various interests named with abundant fuel, and the population, wealth, and other material interests of the State will continue to be benefitted and enhanced, and the comfort, enjoyment, and happiness of the people of the State greatly increased.

It is charged that about May 25th, 1897, the Ohio Oil Company, an Ohio corporation, as its name implies, caused a well to be drilled near Alexandria, Madison county, which produces natural gas and petroleum in large quantities. The location of this well is described, as well as that of five other wells drilled at about the same time as the one first named, all of which produce both natural gas and petroleum, and have done so ever since their completion. It is charged that, instead of securely anchoring the wells as drilled, so as to confine the gas produced by them within two days next after their completion, the defendant, ever since the completion of the wells, which have been completed for some time, has "unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been wasted and lost, and whereby the State's supply of natural gas has been greatly diminished, and the property of its citizens within the said gas territory dependent upon the continued supply of natural gas for fuel, as aforesaid, has been greatly damaged and decreased in value." It is also charged that the defendant avows its purpose to permit the gas to escape continuously and indefinitely hereafter from said wells, and refuses to make any effort to confine it, and declares its purpose to drill other wells in the gas territory, and permit the gas therefrom to flow and escape into the open air, and that if the gas continues to flow from the wells the supply of natural gas upon which the citizens of the State depend will be greatly diminished; that the pressure of gas as found in said Trenton rock will be greatly diminished, and that by the diminution of such pressure water will accumulate in the rock stratum and ultimately and entirely displace and overcome

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the gas supply; that because of the wrongful acts of the defendant above described heretofore committed and now continuing its property and that of its citizens has been and will continue to be essentially interferred with, and the comfortable enjoyment of the lives of its citizens greatly interrupted; and plaintiff avers "that it has no adequate remedy at law for the redress of its grievances complained of; that it is impossible accurately to fix in dollars and cents the damage the plaintiff has sustained and will sustain by reason of the wrongful and unlawful acts of the defendant, if suffered to continue, and that the plaintiff's injuries on account thereof are and will be great and irreparable, and increase as said gas is permitted to flow and the number of wells wherein the same is unconfined continues to increase, and that the ordinary remedies, though repeatedly resorted to by plaintiff, have proved ineffectual to restrain or check the wrongful action of defendant."

It is charged that the penalties provided by law for the unlawful acts above described are whol-y inadequate, and that the defendant has openaly defied and continues to defy the lawfully constituted authorities of the State in their efforts to enforce and recover in the name of the State the penalties provided by law for such wrongful acts committed by the defendant, and the injunctive relief is necessary in order to restrain the continued wrongful acts of the defendant, and that, unless the same is given, one of the greatest
26 natural resources of the State will be ultimately destroyed; that in order to obtain even a partial and inadequate remedy for the wrong done a multiplicity of suits must be resorted to, entailing great expense and affording no considerable relief, unless the defendant is restrained and prohibited by injunction from doing the things complained of.

It is therefore prayed that upon final hearing the defendant and its agents, servants, and employés be perpetually enjoined and prohibited from further suffering and permitting the natural gas produced in said wells or any of them to escape from them, and that the defendant be ordered and directed forthwith to securely confine the same, either by anchoring each of the wells or by confining the gas in tanks, pipes, or other proper receptacles, and that failing to do so the sheriff of Madison county be ordered to anchor, secure, and confine the natural gas in each of said wells, and that the expense of such anchoring be taxed as part of the cost of suit.

It is intimated by appellee's learned counsel that the State has nor right to maintain such a suit; but whether it be on account of lack of capacity to sue or simply because the complainant does not state facts sufficient is not made plain by the argument of appellee's counsel. If it was the intention to question the capacity of the State to sue, counsel should have embraced in the demurrer the second statutory ground for demurring, namely, "that the plaintiff has not legal capacity to sue." Sec. 342, Burns' R. S., 1894 (sec. 339, R. S., 1881; *ib.*, Horner's R. S., 1897).

But the courts of the State and United State- are open to the State,

both in its sovereign capacity and by virtue of its corporate rights, in both of which characters it sued here.

Indiana *vs.* Kentucky, 136 U. S., 479.
Indiana *vs.* Woram, 6 Hill, 33; 40 Am. Dec., 378.
State *vs.* Portsmouth Savings Bank, 106 Ind., 435.
State *vs.* Adams Express Co., 144 Ind., 549.
Adams Express Co. *vs.* Indiana, 165 U. S., 255.
State *vs.* Chicago & E. I. R. R. Co., 145 Ind., 229.
State *vs.* Union Nat'l Bank of Muncie, 145 Ind., 537.
State *vs.* Western U. Tel. Co., 146 Ind., 54.
23 Am. & Eng. Ency. of Law, p. 80.

27 The appellee contends that "the question of the exhaustion of the gas is certain, according to the averments in both the injunction cases, and the question therefore is, Who shall be permitted to exhaust it?" "The State contends," says appellee, "that the manufacturers and gas companies shall be allowed that privilege for the purpose of bargain and sale, although it incidentally avers benefit to the people, and all this to the exclusion of an oil company who is also using gas for the purpose of a legitimate business. In such matters of private concern the State has no interest and should not have any."

It is true the production of oil is a legitimate business; but the waste and destruction of natural gas, which appellee's demurrer admits it is engaged in, defiantly, constantly, and in utter contempt of the laws of Indiana and the welfare and comfort of its citizens, is not only not a legitimate business, but has been placed under the ban of two prohibitory statutes in this State. Secs. 2316–2318, Burns' R. S., 1894 (Acts 1891, p. 55; Acts 1893, p. 300). Section 1 of the latter act provides "that it shall be unlawful for any person, firm, or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes or other safe receptacle for a longer period than two (2) days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other safe and proper receptacles."

The constitutionality of the latter act is assailed by the appellee; but the former act, being very much of the same nature as regards its constitutionality as the latter, was assailed by the appellant in Townsend *vs.* State, — Ind., —, 47 N. E., 19, for every conceivable constitutional objection and for every objection urged to the act now under consideration, and this court in that case upheld the constitutionality of that act.

It is asserted with great confidence that the gas in or under the appellee's land is a part of the land, and that it is a reasonable
28 use thereof to mine for the oil therein, even though gas is thereby incidentally wasted by permitting its escape into the open air, and that a statute prohibiting such a reasonable use is unconstitutional, and several Pennsylvania and Ohio cases are cited,

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together with one from New York and one in West Virginia, to the effect that petroleum is a mineral, and while it is in the earth it is a part of the realty, and that when it reaches a well and is produced on the surface it becomes personal property and belongs to the owner of the well. It is therefore argued that natural gas is likewise a part of the land in or under which it is found, and that the owner of the land may and has a lawful right to assert absolute dominion over all that is found in or under his land to the center of the earth and for an unlimited distance upwards from the surface. The force of these authorities depends entirely upon the analogy between oil or petroleum and natural gas in or under the land. It must be confessed that there is a marked difference between these two sub-tances in their nature. This court has likened natural gas as to its property characteristics to fish in the waters and wild game in the forest before taken and reduced to possession.

Townsend *vs.* State, *supra*, and cases there cited.

But appellee's learned counsel rely on a quotation made by this court in the latter case from the Pennsylvania supreme court and which had in a gas case been previously quoted by this court—the People's Gas Co. *vs.* Tyner, 131 Ind., 281. That quotation is as follows: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' They belong to the owner of the land and are a part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land or come under another's control the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas so that it comes into his well and under his control, it is no longer yours but his."

29 The part of this quotation that seems favorable to appellee's contention is this: "They (the water, gas, and oil) belong to the owner of the land and are a part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land or come under another's control the title of the former owner is gone." This much of the quotation was not adopted as law by this court in either of the cases in which the quotation is found. On the contrary, in the latter case, this court said: "By the Tyner case, 131 Ind., 281, 282, this court likened natural gas and laws regulating the same to wild animals and laws regulating the taking of such animals. The supreme court of Minnesota, in State *vs.* Rodman, 58 Minn., 393, having under consideration the constitutionality of a certain game law of that State, said: 'We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common. The preservation

of such animals as are adapted to consumption as food or to any other useful purpose is a matter of public interest, and it is within the police power of the State, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession;'" and this court in the same case also likened natural gas and its characteristics as property to fish and the laws regulating the taking thereof. There is no such thing in such laws, either as to wild animals or fish, to the effect that they become the property of the owner of the land on which the animals are found or in the waters of which the fish are found, and there is no such thing in such laws to the effect that after the title has once vested by actual reduction to possession that the same may wander off and vest in some one else. To say that the title to natural gas vests in the owner of the land in or under which it exists today, and that tomorrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd and contrary to all the analogies of the law than to say that wild animals or fowls in "their fugitive and wandering existence" in passing over the land become the property of the owner of such land, or that fish in their passage up or down a stream of water become the property of each successive owner over whose land the stream passes. It is as unreasonable and untenable as to say that the air and the sunshine which float over the owner's land is a part of the land and is the property of the owner of the land. We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and therefore that the act from which we have quoted is not violative of the constitution as an unwarranted interference with private property.

But appellee's counsel contend that a proper construction of the act makes it wholly inapplicable to the subject of this suit, the prevention of the waste of gas; that it does not apply to a well unless it endangers persons or property. It is not in the language of the act that counsel claim to find this meaning, but they claim to find it in the preamble thereto, reading thus: "Whereas great danger to life and injury to persons and property is liable to result from the improper, unsafe, and negligent sinking, maintenance, use, and operation of natural-gas and oil wells, therefore," etc. It is not claimed, as it cannot with reason be, that the language of the act is either ambiguous or doubtful in its meaning. It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil; and if, on review of the whole act, a wider intention than that expressed in the preamble appears to be the real one,

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effect is to be given to it, notwithstanding the less extensive import of the preamble.

23 Am. & Eng. Ency. of Law, 331, 332, and authorities there cited.
Holbrook *vs.* Holbrook, 1 Pick., 251.
Erie, etc., R. R. Co. *vs.* Casey, 26 Pa. St., 288.
Yazoo, etc., C. Co. *vs.* Thomas, 132 U. S., 174.

31 Hughes *vs.* Done, 1 Q. B. (1 A. & E. N. S.), 301.

In Yazoo, etc., Co. *vs.* Thomas, *supra*, the Supreme Court of the United States said: "The preamble to the act is referred to by counsel as sustaining their construction, because it is therein declared that the work is one 'of great public importance' and 'to be encouraged by legislative sanction and liberality,' and 'that the physical difficulties of constructing and maintaining railroads to, across, along, or within either the Mississippi, Sunflower, Deer Creek, or Yazoo bottoms or basins or other alluvial lands herein referred to are such that no private company has so far been able to establish a railroad and branches, developing said basins and alluvial lands and connecting them with the railroad systems of the country;' but as the preamble is no part of the act and cannot enlarge or confer powers nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up."

We have no doubt, from the language of the act and the circumstances surrounding its enactment, that the chief object in the passage thereof was to prevent the waste of natural gas.

23 A. & Eng. Ency. of Law, 335, 336.
Edger *vs.* The Board, 70 Ind., 331.
Stout *vs.* Board, 107 Ind., 343.
May *vs.* Hoover, 112 Ind., 455.
Hunt *vs.* R. R. Co., 112 Ind., 69.

It is contended that the act does not apply to appellee's case, because it was intended, as is claimed, to apply only to wells producing oil alone and to wells producing gas alone and not to what counsel call combination wells, producing both oil and gas, as is the case with the appellee's wells, as disclosed in the complaint. At the time of the passage of the act the chief waste of natural gas which was going on and had been for some time, as shown by the Eleventh Annual Report of the United States Geological Survey for 1889–1890 and the current history of the times, resulted from what counsel term combination wells, producing both oil and gas; the waste from wells producing gas alone was small in compari-

32 son with that from such combinations wells. In the light of these historical facts it would be extremly absurd to suppose that the legislature intended to prevent waste only by closing the spigot and leaving the bung wide open; but even the language of the statute forbids such construction. The act made unlawful by the express words of the section quoted is "to allow or permit the

flow of gas or oil from any such well to escape into the open air." In this sentence there is but one well spoken of. The prohibition is against the escape of gas, and it is undeniable that it is equally against the escape of oil, and it is equally clear that the prohibition against the escape of both relates to the same well, and therefore, if they are both permitted to escape from the same well, the permission of the escape of each is made unlawful by the section quoted. Had the statute made the violation thereof a crime, would any rational being contend that an indictment charging the accused with permitting both oil and gas to escape from such well would not be good? Certainly not.

It is next contended that there is not authority or right of action in the State at common law, and especially that the State cannot maintain a suit in equity, either under the statute or at common law. This being a suit in equity, as the law existed prior to the adoption of the civil code of 1852, if the objection last mentioned be well taken, it is fatal to the complaint.

The reason assigned in argument why the State cannot maintain the action for an injunction is that the statute provides a different remedy, namely, the recovery of a penalty of $200.00 for each violation of the act, and a further penalty of $200.00 for each ten days during which such violation shall continue, to be recovered in a civil action in the name of the State, for the use of the county in which such well is located, with attorneys' fees and costs of suit; and another remedy provided in another section of the act is that certain persons in the vicinity are authorized to go upon the land where any well is situate, from which gas or oil is allowed to escape in violation of the act, and shut up the same and pack and tube said well so as to prevent *to* escape of gas or oil, and maintain a civil
33 suit against the owner for the costs of such closing of said well, with attorneys' fees and costs of suit; but this court has gone much further than to hold that the fact that the civil remedy given to recover penalties and the other remedies for violations of the act does not bar the right to an injunction.

In the case of The People's Gas Co. *vs.* Tyner, *supra*, it was said: "No authority has been cited and we know of none supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitro-glycerine within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself and not sustained by the public in general."

In that case it was held that the extraordinary equitable remedy by injunction could be invoked by a private citizen, even though the act to be enjoined was made a crime by statute; and the same rule was applied in The Columbian Athletic Club *vs.* The State, 143 Ind., 98, where this court said: "Extraordinary emergencies in many cases call for extraordinary remedies. * * * The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham, 'that it is the duty of courts in equity (and the same is true of all courts and all institutions) to adapt its prac-

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tice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases, which, the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is no other remedy.' This rule, the author (Judge Redfield) concludes, is certainly worthy of one of the ablest, wisest, and best judges that ever administered the chancery law of England or America."

Our code provides that "whatever is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property, so as *ennentially* to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an ac-
34 tion. * * * The nuisance may be enjoined or abated and damages recovered therefor" (§§ 290, 292, Burns' R. R., 1894; §§ 289, 291, R. S., 1881; *ib.*, Horner's R. S., 1897). The facts alleged in the complaint show that the acts of the appellee are such as to essentially interfere with the comfortable enjoyment of life and the property of the citizens of the State.

The supreme court of Kansas, in State *vs.* Crawford, 28 Kansas, 720, said: "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance." The demurrer to the complaint admits that the wells of the appellee are in this category.

The supreme court of California, in a suit by the attorney general to enjoin the Truckee Lumber Company from discharging sawdust into the Truckee river with the effect of destroying the fish therein, in sustaining the action, which is closely ana*na*gous to this action, *the court* used the following language, which we adopt: "It is alleged that the acts of the defendant have the effect of poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is 'an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or any considerable number of persons' is a public nuisance. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the State (*Ex parte* Maier, 103 Cal., 476; 42 Am. St., 129), as in England it was in the King, and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law and preserved and expressly provided for by the statutes of this and every other State in the Union. The complaint shows that by the repeated and continuing acts of defendant this public property right is being and will continue to be greatly interfered with and impaired, and that such acts constitute a nuisance, both under our statute and at com-
35 mon law, is not open to serious question (People *vs.* Elk River, etc., Co., 107 Cal., 219; 48 Am. St., 121). * * * The dominion of the State for the purpose of protecting its sovereign rights in the fish within its waters and their preservation for

the common enjoyment of its citizens is not confined within the narrow limits suggested by the defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the State, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the State. * * * While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. * * * The fact that acts of the character alleged are by the penal code made a misdemeanor and punishable as such does not make them less a nuisance nor imply that the legislature intended to make the criminal remedy exclusive of the civil; nor is there anything in the objection that the attorney general is not privileged to maintain the action upon his own information without the intervention of a private relator." People *vs.* Truckee Lumber Co., 116 Cal., 397. The same doctrine is laid down in—

People *vs.* City of St. Louis, 10 Ill., 351.
Commonwealth *vs.* Pittsburgh, etc., R. R. Co., 24 Pa. St., 159.
State *vs.* Matschan (Ore.), 46 Pac., 791.

In the 24 Pa. St. case, *supra*, it was said: "The matter complained of is an invasion of a public highway, and it must be enjoined against. The defendants are not allowed the excuse that this part of the canal is practically abandoned, for no neglect is chargeable against the State; its officers are insisting on its rights, and it is the merest effrontery in the defendants to set up their views of the need of the canal against the State which thought fit to
36 make it and against the public officers who are entrusted with its custody. It is therefore ordered that an injunction issue."

The State of South Carolina brought suit in one of its courts to enjoin the Coosaw Mining Company from digging, mining, or removing phosphate rock and phosphatic deposits from the bed of the river. On petition of the mining company the case was removed into the circuit court of the United States. From the decree of that court the mining company appealed to the Supreme Court of the United States. That court, in affirming the judgment of the circuit court awarding an injunction, said: "An instructive case upon this subject is Attorney General *vs.* Jamaica Pond Aqueduct, 133 Mass., 361, 363, 364*a*. That was an information in equity in the name of the attorney general to restrain a corporation from doing certain illegal acts, the necessary effects of which would be not only to impair the rights of the public in the use of one of the great ponds of Massachusetts for the purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores

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slime, mud, and offensive vegetation detrimental to the public health. It was held, upon the authority of numerous cases, American and English, that where the nuisance is a public one an information by the attorney general was the appropriate remedy. After observing that the preventive force of a decree in equity restraining the illegal acts before any mischief was done would give a more efficacious and complete remedy than an indictment or proceedings under a statute for the abatement of the nuisance, the court said: 'There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. * * * If a corporation or an individual is found to be doing acts without right the necessary effect of
37 which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney general to restrain and prevent the mischief.' So in Eden on Injunctions: 'The usual and perhaps the more correct mode of proceeding in equity in cases of public nuisance is by information at the suit of the attorney general,' p. 267. Mr. Justice Story said that an information in equity at the suit of the attorney general would lie in cases of purpresture and public nuisance, the jurisdiction of courts of equity being sustained because of 'their ability to give a more complete and perfect remedy than is attainable at law in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations.'

Eq. Jur., §§ 922, 923, 924.
The People *vs.* Vanderbuilt, 26 N. Y., 287.
District Attorney *vs.* Lynn & Boston R. R. Co., 16 Gray, 242, 245.
Kerr on Injunctions, 262, 263.
1 Joyce on Injunctions, 120.

These principles are applicable to the present case. The remedy at law for the protection of the State in respect to the phosphate rocks and phosphatic deposits in the beds of its navigable waters is not so efficacious or complete as a perpetual injunction against interference with its rights by digging, mining, and removing such rocks and deposits without its consent. The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust for an indefinite period by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or

present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are
38 entitled to have is security for all time against illegal interference with the control by the State of the digging, mining, and removing of phosphate rock and phosphatic deposits in the bed of the Coosaw river. Such security was properly given by the decree below. Decree affirmed." Coosaw Mining Co. *vs.* South Carolina, 144 U. S., 566.

Accordingly, in Crawford *vs.* Tyrrell, 128 N. Y., 344, it was held: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained and for an injunction against the continued use of his premises in such a manner." And in Mobile *vs.* Louisville & Nashville R. R. Co., 84 Ala., 115, 126, it was held that "the mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

It has been held that the United States, in its sovereign capacity, may enjoin hydraulic mining to the detriment of navigable streams. United States *vs.* N. Bloomfield Gravel Mining Co., 81 Fed., 243.

In a case where the State officers failed to enforce the law against brokerage in railroad tickets the railroads brought suit in the circuit court of the United States to enjoin the brokerage business as unlawful. The circuit court of the United States for the middle district of Tennessee granted the injunction, and, in answering the objection that such a proceeding was novel and unprecedented, said: "I return, now, to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable
39 remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled and precedent after precedent established from time to time to meet new conditions and to do full justice until the argument has long since lost most of its force, although it is still maintained in form. It has been in answer to arguments like this that the great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion, regulated by analogy, by what would be manifestly just, in view of all the existing conditions, and requiring as a condition that there is no adequate remedy at law. Beyond this

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the courts have not gone in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive; that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civilization. A similar objection that novel use was being made of the writ of injunction was pressed in the case of Toledo, A. A. & N. M. R'y Co. *vs.* Pennsylvania Co., 54 Fed., 751, and was answered by the court as follows: 'Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore in its time without a precedent. If based on sound principles and beneficent results follow their enforcement, affording relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.' Mr. Justice Brewer, sitting in the circuit court for Nebraska, said: 'I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasing complex business relations and the protection of rights can demand.' Mr. Justice Blatchford, speaking for the Supreme Court in Jay *vs.* St. Louis, 138 U. S., 1, said: 'It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation.'" Nashville, C. & St. L. R'y Co. *vs.* McConnell, 82 Fed., 76. To the same effect is our own case of The Columbian Athletic Club *vs.* State, *supra*.

It is true that, as a result of the principles announced in the previous part of this opinion, natural gas, when reduced to actual possession by the land-owner, when drawn into his well, pipes, tanks, or other receptacles, thereby becomes his personal property, subject to his dominion; but, as said by this court in People's Gas Co. *vs.* Tyner, *supra*, "the rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others."

Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind.

But appellee tries to excuse its conduct on the score that it cannot mine and utilize the oil under and in its land without wasting the gas; but there is nothing in the record to bear out that claim. However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the
41 storehouse of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well-being of society than any other of the bounties of the earth.

Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom and utilize it without wasting the oil; but, even if it cannot draw oil from such wells without wasting gas and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana and, in effect, says: "It is my property to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana help yourselves if you can. What are you going to do about it?"

We had petroleum oil for more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State; but we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless.

We therefore conclude that the facts stated in the complaint
42 make a case of public nuisance, which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action; hence the circuit court erred in sustaining appellee's demurrer to the complaint.

The judgment is reversed and the cause remanded with instructions to overrule said demurrer and require the defendant to answer the complaint, and for further proceedings in accordance with this opinion.

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43 And afterwards, to wit, on the 28th day of April, 1898, came the appellant, by counsel, and filed its petition for a writ of error to the Supreme Court of the United States in the words and figures following, to wit:

44 STATE OF INDIANA:

In the Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA. } No. 18600.

Now comes said The Ohio Oil Company and shows to this honorable court that heretofore, to wit, on the 12th day of March, 1898, the said State of Indiana filed its complaint in the county of Madison, in said State, against said The Ohio Oil Company to enjoin it, said The Ohio Oil Company, from allowing natural gas to escape from certain wells operated by it in said county of Madison, which said action was so brought and prosecuted under and by virtue of an act of the General Assembly of the State of Indiana approved March 4, 1893, being the same act as is heretofore set forth at full length in the answer in this cause.

That in said circuit court of Madison county, Indiana, upon demurrer to said complaint, said The Ohio Oil Company contended that said act of the General Assembly of the State of Indiana was in violation of the 14th amendment to the Constitution of the United States, in that it takes away the liberty and property of said The Ohio Oil Company without due process of law, and that said circuit court of Madison county adjudged that said act of the legislature of Indiana was not in violation of said 14th amendment to the Constitution of the United States and overruled the demurrer to said complaint.

That thereafter, on the 2nd day of April, 1898, in said Madison circuit court, said The Ohio Oil Company filed its answer to said complaint; which answer is in these words:

45 Now comes the defendant, The Ohio Oil Company, and for its answer to the complaint herein says it is a corporation duly organized under the laws of Ohio, and duly complied with all the laws of Indiana with respect to doing business in this State before the bringing of this suit; that this action is prosecuted under and by virtue of an act of the General Assembly of the State of Indiana approved March 4th, 1893; which said act is in these words:

46 An act concerning the sinking, safety, maintenance, use, and operation of natural gas and oil wells, prescribing penalties and declaring an emergency.

Approved March 4, 1893.

Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sink-

ing, maintenance, use and operation of natural gas and oil wells; therefore,

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacles for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well pipes or other safe and proper receptacles.

SEC. 2. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one-half inch as great as the hole of such well, to extend at least three feet above the salt-water level, where salt water has been struck; where no salt water has been struck such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been "shot," the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone and dry cement, so as to form a concrete up to a point at least eight feet above the top of the gas or oil bearing rock or rocks and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid, which shall be properly rammed as aforesaid. The casing from the wall shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball, eight inches in diameter, shall be dropped in the well and securely rammed into the shale by the driller or owner of the well, after which not less than one cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

47

SEC. 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which such violation shall continue; and all such penalties shall be recoverable in a civil

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action or actions in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and *and* costs of suit.

48 SEC. 4. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section one of this act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this State against the owner, lessee, agent or manager of said well, and each of them jointly and severally to recover the cost and expense of such tubing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

SEC. 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section two of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situated and take possession of such well, and plug and fill the same in the manner provided by section two of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporations so failing, jointly and severally, to recover the costs and expense of such plugging and filling, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

49 That before and at the time of the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor into the earth and rock below in said county of Madison, and that in the carrying on of said business it has expended many thousand of dollars in the leasing of territory, purchase of machinery and equipment thereof, and for the drilling of a number of wells, and for pipes and pipe lines, all of which *was* then owned and still owns.

The defendant admits that it drilled the well complained of herein, but said that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county, and having there no plant for that purpose, and such gas in such case being of no value to the defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized, and defendant being then and there engaged in the transportation of oil to and from the State of Indiana and among the various States in the United States.

That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same, as so constructed and operated, is not dangerous to life, health, or property.

When said well was so drilled and completed oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land-owner *a* stipulated royalties therefor, and so operated the same with the knowledge, approbation, and consent of such land-owner and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action.

That in said well and in the same strata of rock whence such oil was produced there *was* also found at said time large quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

And the defendant further says that no machinery *of* process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed, and the people of said county and State will be deprived of the use and profits of such oil, which is vastly of more value than natural gas in said well.

And defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said oil well with the highest skill.

The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring said territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as *in* hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no notice or knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been so expended and after said well had been so completed.

That when the act of the legislature upon which this prosecution is founded was passed there was no combination gas and oil well existing in said State, wells having been subsequently thereto *been* developed containing and producing both natural gas and oil, to which said statute does not apply.

That in the territory where said well complained of *of* situate

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there are a number of paying oil wells owned and operated
51 by various persons and corporations, and said field when properly developed may reasonably be expected to be a large one for the production of oil, which will be and is of very large value *of* said county.

Wherefore defendant prays judgment for its costs and all other proper relief.

52 This defendant, further answering, says that before and at the time of the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor into the earth and rock below in said county of Madison, and that in the carrying on *if* said business it had expended many thousands of dollars in the leasing of territory, the purchase of machinery, and equipment thereof, and for the drilling of a number of wells, and for pipes and pipe lines, all of which it then owned and still owns.

The defendant admits that it drilled the well complained of herein, but says that said well was so drilled, in good faith, solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing and transporting natural gas in said county, having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same as *to* constructed and operated is not dangerous to life or property.

That said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land-owner the stipulated royalties therefor, and so operated the same with the knowledge, approbation, and consent of such land-owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action, all of which was so done under and by virtue of a lease to defendant by the owner of said land granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

53 That in said well and in the same strata of rock whence such oil was produced there *was* also found at said time quantities of natural gas which, by its own pressure, escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

And the defendants further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby, in such a case, the oil in such well can be produced

and saved unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed, and the people of said county and State will be deprived of more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring territory, in equipping said plant, in constructing such oil line, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescense of the plaintiff and with no notice of knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money has been so expended and after said well had been so completed.

54 That in the territory where said well complained of is situate there are a number of paying oil wells owned and operated by various persons and corporations, and said field, when properly developed, may reasonably be expected to be a large one for the production of oil, which will be and is of great value to the people of said county.

This defendant further alleges that said act of the General Assembly of the State of Indiana, as above set out, violates the fourteenth amendment of the Constitution of the United States, in this, that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the law.

Wherefore defendant prays judgment for its costs and all other proper relief.

55 And on the day last aforesaid the plaintiff, said State of Indiana, filed its demurrer to said answer; which demurrer was thereupon sustained, and the said Ohio Oil Company refusing to plead further, electing to stand upon its said answer, the court rendered final judgment perpetually enjoining said The Ohio Oil Company from allowing any gas to escape from said wells.

And afterwards, on the 21st day of April, 1898, upon appeal from said judgment to this honorable court, the said judgment of the Madison circuit court was affirmed, and in any by said judgment of this court it was held and decided that the said act of the legislature, as above herein set out, was in all respects constitutional, and that the same did not deprive said The Ohio Oil Company of liberty or property without due process of law; and your petitioner shows to

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this honorable court that the said several judgments and decrees of said circuit court and of the said supreme court of the State of Indiana are manifestly erroneous in deciding that the said statute of the State of Indiana does not deprive said The Ohio Oil Company of liberty and property without due process of law.

And therefore prays that this honorable court issue its writ of error directed to the honorable the judges of the supreme court of the State of Indiana, requiring them, the said judges, to send up to the Supreme Court of the United State- a complete record of said cause.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Ohio Oil Co.

56 And be it further remembered that on the same day said petition was granted and said writ of error allowed as prayed for by the order of the Honorable Timothy E. Howard, chief justice of said court, made and entered in said cause in these words:

"Allowed by Timothy E. Howard, chief justice of the supreme court of Indiana."

57 And on the same day came the appellant, by counsel, and filed its certificate of the chief justice of the supreme court of Indiana in the words and figures following, to wit:

58 STATE OF INDIANA, ss:

In the Supreme Court of Indiana.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA. } No. 18600.

I, Timothy E. Howard, chief justice of the supreme court of Indiana, do hereby certify that in the above and foregoing cause, wherein final judgment was rendered in the supreme court of Indiana on the 21st day of April, 1898, that in said cause there was involved, discussed by counsel, and decided by this court the question whether the act of the General Assembly of the State of Indiana, approved March 4, 1893, entitled "An act concerning the sinking, safety, maintenance, use, and operation of natural-gas and oil wells, prescribing penalties and declaring an emergency," was in violation of the 14th amendment to the Constitution of the United States, and that in such decision the supreme court of the State of Indiana in the cause aforesaid and at the time aforesaid held and decided that the said act of the General Assembly was a valid statute and that the same was not in conflict with the 14th amendment to the Constitution of the United States.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court the 28 day of April, 1898.

TIMOTHY E. HOWARD,
Chief Justice.

[SEAL.]

59 And on the same day came the appellant, by counsel, and filed its citation and service in the words and figures following, to wit:

60 UNITED STATES OF AMERICA:

To the State of Indiana, for the use of Madison county, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Indiana in a cause wherein The Ohio Oil Company if the plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Timothy E. Howard, chief justice of the supreme court of Indiana, this 28th day of April, in the year of our Lord 1898.

TIMOTHY E. HOWARD,
Chief Justice.

Service of foregoing citation is hereby acknowledged.
April 28, 1898.

W. A. KETCHAM,
Attorney General of Indiana.

MERRILL MOORES,
Of Counsel for the State.

61 And on the 16th day of May, 1898, came appellant, by counsel, and filed its writ of error herein in the words and figures following, to wit:

62 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of the State of Indiana, greeting:

Because on the record and proceedings, as also on the rendition of a *a* judgment in a plea which is in the said supreme court, before you, between The Ohio Oil Company and The State of Indiana, a manifest error hath happened, to the great damage of the said Ohio Oil Company, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said

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Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said [SEAL.] circuit court this 16 day of May, A. D. 1898.

NOBLE C. BUTLER, *Clerk.*

63 And on the same day came the appellant, by counsel, and filed its appeal bond herein in the words and figures following, to wit:

64 In the Supreme Court, *ss:*

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA. } No. 18600.

Know all men by these presents that the undersigned, The Ohio Oil Company, as principal, and George Shirts, as surety, are held and firmly bound unto the State of Indiana in the sum of five hundred ($500) dollars upon the following conditions:

That whereas in said case, in the Madison circuit court, on the second day of April, 1898, the said last-named court rendered judgment perpetually enjoining said The Ohio Oil Company from allowing natural gas to escape from the wells described in the complaint in this case, together with all costs in said case; and

Whereas said The Ohio Oil Company appealed from said judgment to the supreme court of Indiana; and

Whereas the said supreme court of Indiana affirmed said judgment on the twenty-first day of April, 1898, from which *several* judgment said The Ohio Oil Company has prayed a writ of error to the Supreme Court of the United States:

Now, therefore, if the said The Ohio Oil Company shall duly prosecute its writ of error and shall pay any judgment and costs that may be rendered or affirmed against it in said Supreme Court of the United States in said case, then this obligation shall be void; otherwise same to remain in full force and effect.

Witness our hands and seals this 28th day of April, 1898.

THE OHIO OIL COMPANY.
GEO. SHIRTS.

Taken and approved by me this 28th day of April, 1898.

TIMOTHY E. HOWARD,
Cheif Justice of Supreme Court of Indiana.

65 And on the same day appellant, by counsel, filed its assignment of errors to the Supreme Court of United States, together with a joinder therein by appellee, in the words and figures following, to wit:

66 In the Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA. } No. 18600.

How comes said The Ohio Oil Company and shows to the court that there is manifest error in the record of the proceedings and judgment in the above-entitled cause in this:

1. The circuit court of Madison county erred in overruling the demurrer to the amended complaint.

2. The circuit court of Madison county erred in sustaining the demurrer to the defendant's answer.

3. The supreme court of Indiana erred in deciding that the circuit court of Madison county committed no error in overruling the demurrer to the complaint.

4. The supreme court of Indiana erred in deciding that the circuit court of Madison county committed no error in sustaining the demurrer to defendant's answer.

5. The supreme court of Indiana erred in deciding that the said act of March 4, 1893, was not in violation of the 14th amendment to the Constitution of the United States, and erred in holding that said act of the legislature *if* Indiana did not operate to deprive said The Ohio Oil Company of liberty and property without due process of law, for which errors said The Ohio Oil Company prays that said judgment be in all things reversed.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Att'ys for Ohio Oil Co.

67 The defendant in error, The State of Indiana, says there is no error in the proceedings and judgment in said cause.

W. A. KETCHAM,
Attorney General of Indiana.

MERRILL MOORES,
Of Counsel for the State.

68 STATE OF INDIANA:

Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA. } Madison C. C. No. 18600.

I, Alexander Hess, clerk of the supreme court of the State of Indiana, hereby certify that the above and foregoing transcript contains full, true, and complete copies of the record and of all the papers, entries, proceedings, and judgment in the above-entitled cause, together with a full, true, and complete copy of the opinion of the supreme court in this cause and a full, true, and complete copy of the opinion of the said supreme court referred to in the opinion in this cause as the one upon which the decision in the above-entitled

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cause is based; also of the petition for a writ of error, allowance thereof by the chief justice of the said court, assignment of errors, joinder, writ of error, citation and service, and appeal bond to the Supreme Court of the United States.

In witness whereof I hereunto set my hand and affix the seal of said court, at my office, in Indianapolis, this 20th day of May, 1898.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ALEX. HESS,
Clerk Supreme Court of Indiana.

Endorsed on cover: Case No. 16,893. Indiana supreme court. Term No., 309. The Ohio Oil Company, plaintiff in error, *vs.* The State of Indiana. Filed May 27th, 1898.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 339 85,

THE OHIO OIL COMPANY, PLAINTIFF IN ERROR,

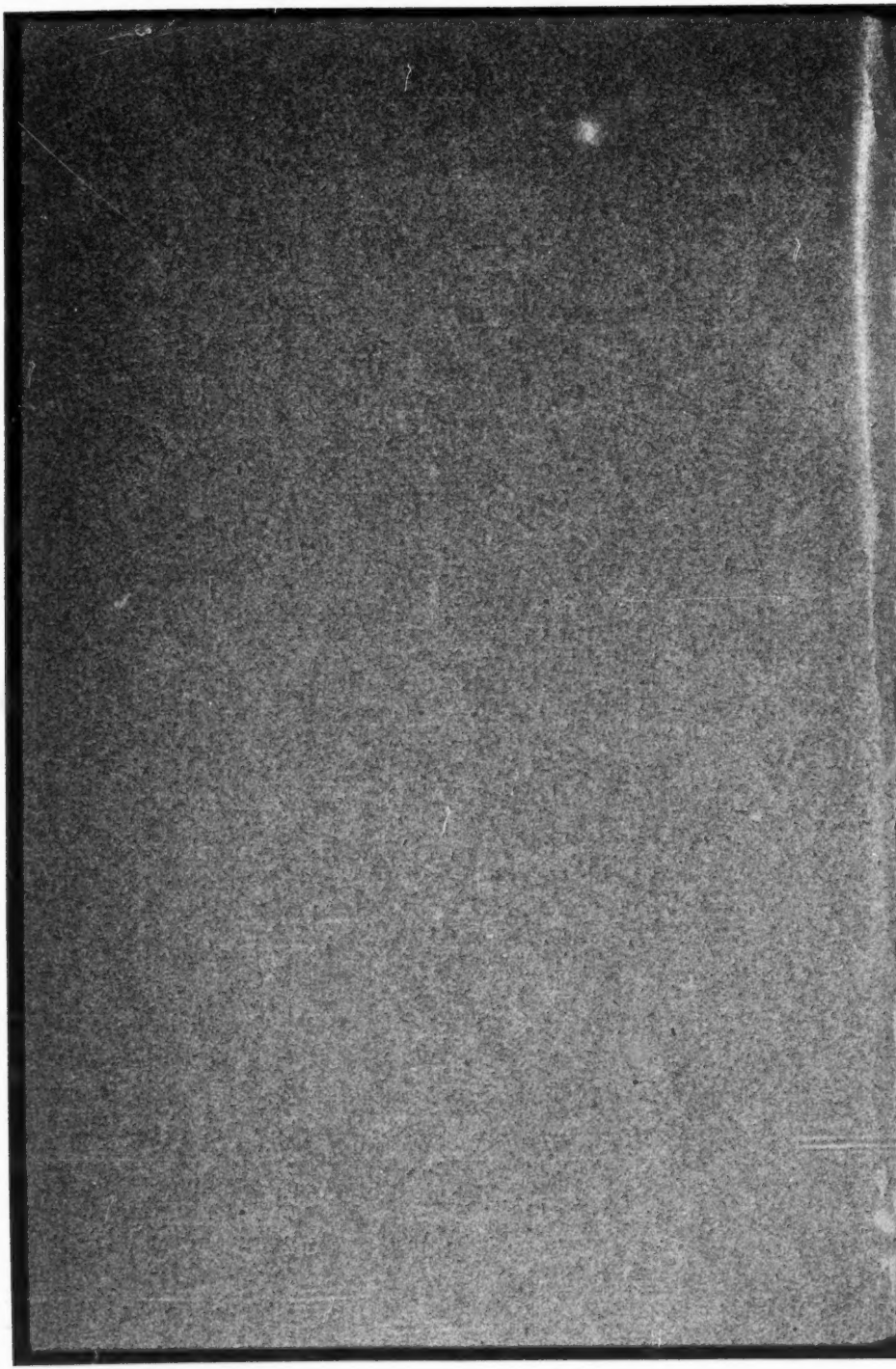
vs.

THE STATE OF INDIANA, FOR THE USE OF MADISON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED MAY 27, 1898.

(16,894.)



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(16,894.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 310.

THE OHIO OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA, FOR THE USE OF MADISON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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1 On the 21st day of April, 1898, M. F. Elliott and Stephenson, Shirts & Fertig, attorneys for the appellant, The Ohio Oil Company, filed in the clerk's office of the supreme court of Indiana the following præcipe in words and figures, to wit:

THE STATE OF INDIANA:

In the Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON County. } No. 18601.

The clerk will please make out complete transcript in above cause, including copy of opinion referred to as the one upon which this cause is decided.

April 21, 1898.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Att'ys for Appellant.

2 STATE OF INDIANA, *ss:*

Supreme Court.

Be it remembered that heretofore, to wit, on the 20th day of April, 1898, the Ohio Oil Company, by its attorneys, M. F. Elliott and Stephenson, Shirts & Fertig, filed in the office of the clerk of the supreme court of Indiana a transcript of the record and proceedings of the Madison circuit court of said State, wherein The State of Indiana, for the use of Madison County, was plaintiff and The Ohio Oil Company was defendant, together with an assignment of errors, joinder, and agreement to submit endorsed thereon; which transcript, assignment of errors, joinder, and agreement to submit are in the words and figures following, to wit:

3 Pleas before the Honorable John F. McClure, sole judge of the Madison circuit court of the county of Madison, in the county of Madison, at a term begun, held, and continued in the court-house, in the city of Anderson, commencing on the first Monday in September, 1898.

Transcript.

No. 12822.

STATE OF INDIANA, } *ss:*
Madison County, }

Be it remembered that heretofore, to wit, on the 16th day of August, 1897, a complaint was filed in the office of the clerk of the Madison circuit court of the county of Madison, in the State of Indiana, wherein The State of Indiana, for the use of The County of

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Madison, is plaintiff and The Ohio Oil Company is defendant; which complaint is in the words and figures following, to wit:

STATE OF INDIANA, } ss:
Madison County, }

Madison Circuit Court, September Term, 1897.

THE STATE OF INDIANA, for the Use of Madison County, *vs.* THE OHIO OIL COMPANY. } Complaint to Recover Penalty for Violation of Law.

The State of Indiana, for the use of The County of Madison,
4 in said State, complains of the defendant, The Ohio Oil Company, a corporation duly organized under the laws of the State of Ohio and doing business under such corporate name in the State of Indiana and in Madison county, therein, and says that heretofore, to wit, on the 24th day of July, 1897, the said defendant had the possession and control of a natural-gas and oil well situated on the following-described real estate, in Madison county, in the State of Indiana, to wit: The east half (½) of the northwest quarter (¼) of section sixteen (16), township twenty-one north, range eight east; that *they are* the owners, managers, and in control
Complaint. of said gas and oil well on the date aforesaid; that on said date *they* had drilled and completed said well and had struck gas and oil therein; that the said defendants did then and there unlawfully allow and permit the flow of gas in great quantities, to wit, two millions cubic feet per day, to escape from said oil well while the same was under the management and control of the said defendant; that since the discovery of oil in said well, on the 25th day of July, 1897, the defendant has made no effort to confine said gas within such well or in the proper pipes or tanks or in any safe receptacle whatever, but *they have* unlawfully, knowingly, and willfully allowed and permitted the flow of natural gas from said well in the quantities aforesaid to escape into the open air for more than two days next after gas and oil were struck in said well, contrary to the form of the statutes in such cases made and provided.

The plaintiff further says that a right of action has accrued to the plaintiff to have and recover from the defendant, for the use of said Madison county, the sum of two hundred dollars, together with costs and reasonable attorneys' fees; that a reasonable attorneys' fee for the recovery of said penalty is fifty dollars.

Wherefore plaintiff demands judgment for the use of the county of Madison on this paragraph of complaint — the sum of two hundred and fifty dollars and the costs and all other necessary and proper relief.

5 Paragraph 2nd.

The State of Indiana, for the use of The County of Madison, complains further of the defendant, the aforesaid Ohio Oil Company, and says that on the 24th day of July, 1897, the defendant was the

owner and had the possession of a natural-gas and oil well situate on the following-described real estate, in Madison county and the State of Indiana, to wit: The east half (½) of the northwest quarter (¼) of section sixteen (16), township twenty-one (21) north, range eight (8) east; that on said day they had drilled said well and had struck gas and oil therein; that for more than ten days next after the two days allowed by law for the securing and confining of said gas and oil in said well the said defendant unlawfully allowed and permitted the flow of natural gas in great quantities, to wit, two million cubic feet per day, to escape into the open air without being confined within such well or proper pipes or other safe receptacle, contrary to the form of the statutes in such cases made and provided.

Complaint.

And the plaintiff avers that a right of action has accrued to the plaintiff to have and recover from the defendant, for the use of said Madison county, the sum of two hundred dollars ($200.00), together with costs and reasonable attorneys' fee for the recovery of said penalty, — is fifty dollars ($50.00).

Wherefore plaintiff demands judgment on this paragraph of complaint in the sum of two hundred and fifty dollars ($250.00), and on both paragraphs of this complaint in the sum of five hundred dollars ($500.00), and all other necessary and proper relief.

DANIEL W. SCANLAN,
Prosecuting Attorney.

6 Afterwards, to wit, on the 2nd day of April, 1898, the same being the 24th judicial day of the March term, 1898, of the Madison circuit court of the county of Madison, in the State of Indiana, the following further proceedings were had in the cause entitled as follows, to wit:

STATE OF INDIANA, for the Use of MADISON COUNTY,
vs.
THE OHIO OIL COMPANY.

Come the parties, by counsel, and the defendant files its demurrer to each paragraph of complaint herein in these words, to wit:

Demurrer to Complaint.

STATE OF INDIANA, *Madison County,* } *set:*

THE STATE OF INDIANA
vs.
THE OHIO OIL COMPANY.

The defendant, The Ohio Oil Company, demurs to each paragraph of complaint herein, and for cause of demurrer says that neither paragraph thereof states facts sufficient to constitute a cause of action.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Defendant.

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Which demurrer is overruled by the court; to which ruling of the court the defendant excepts, and the defendant now files its answer herein in these words, to wit:

7 *Answer.*

STATE OF INDIANA, } ss:
Madison County, }

THE STATE OF INDIANA }
vs.
THE OHIO OIL COMPANY. }

Now comes the defendant, The Ohio Oil Company, and for its answer to the complaint herein says it is a corporation duly organized under the laws of Ohio and duly complied with all the laws of Indiana with respect to doing business in this State before the bringing of this suit; that this action is prosecuted under and by virtue of an act of the General Assembly of the State of Indiana approved March 4th, 1893; which said act is in these words:

"An act concerning the sinking, safety, maintenance, use, and operation of natural-gas and oil wells, prescribing penalties and declaring an emergency.

(Approved March 4, 1893.)

Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural-gas and oil wells; therefore,

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person, firm or corporation having possession or control of any natural-gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well pipes or other safe and proper receptacles.

SECTION 2. Whenever any well shall have been sunk for
8 the purpose of obtaining natural gas or oil, or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been 'shot' there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one-half inch as great as the hole of such well, to extend at least three feet above the salt-water level, where

salt water has been struck; where no salt water has
Answer. been such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with the diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been 'shot,' the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone and dry cement, so as to form a concrete up to a point at least eight feet about the top of the gas or oil bearing rock or rocks and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid. The casing from the well shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball eight inches in diameter shall be dropped in the well and securely rammed into the shale by the driller or owner of the well, after which not less than one cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

9 SECTION 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which said violation shall continue; and all such penalties shall be recoverable in a civil action or actions in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and costs of suit.

SECTION 4. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon
Answer. the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section one of this act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in the State against the owner, lessee, agent or manager of said well, and each of them jointly and severally to cover the cost and expense of such tubing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

SECTION 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section two of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well

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and plug or fill the same in the manner provided by section two of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporation so failing, jointly and severally, to recover the costs and expenses of such plugging and filling, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act."

This defendant, further answering, says that before and at the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock below in said county of Madison, and that in the carrying on of said business it has expended many thousands of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells and for pipes and pipe lines, all of which it then owned and still owns.

Answer. The defendant admits that it drilled the well complained of herein, but *said* that said well — so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county, and having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same as so constructed and operated is not dangerous to life or property.

That said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land-owner the stipulated royalties therefor, and so operated the same with knowledge, approbation, and consent of such land-owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action; all of which was so done under and by virtue of a lease to defendant by the owner of said land granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

That in said well and in the same strata of rock whence such oil was produced there *was* also found at said time quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the

world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed and the people of said county and State will be deprived of the use *of the use* and profits of such oil, which is vastly of more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

Answer.

The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no notice or knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been so expended and after said well had been so completed.

12 That in the territory where said well complained of is situate there are a number of paying oil wells, owned and operated by various persons and corporations, and said field when properly developed may reasonably be expected to be a large one for the production of oil, which will be and is of great value to the people of said county.

This defendant further alleges that said act of the General Assembly of the State of Indiana, as above set out, violates the fourteenth amendment of the Constitution of the United States in this, that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the laws.

Answer.

Wherefore defendant prays judgment for its costs and all other proper relief.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Defendant.

And the plaintiff now files its demurrer to the answer herein in these words, to wit:

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Demurrer to Answer.

STATE OF INDIANA, } ss:
Madison County, }

Madison Circuit Court.

STATE OF INDIANA, for the Use of MADISON COUNTY, }
vs.
THE OHIO OIL COMPANY. }

Demurrer to answer.

The State of Indiana demurs to the answer of the Ohio Oil
13 Company upon the ground that said answer does not state facts sufficient to constitute a cause of defense.

W. A. KETCHAM,
Attorney General.

MERRILL MOORES,
C. C. SHIRLEY,
Of Counsel for the State of Indiana.

Sustained.

Which demurrer is sustained by the court; to which ruling of the court the defendant excepts; and the defendant refusing to plead further, the court now renders judgment herein.

It is therefore considered, ordered, and adjudged by the court that the plaintiff have and recover of the defendant the sum of four hundred dollars ($400.00) as damages and the further sum of one hundred dollars ($100.00) as and for attorneys' fees, in all the sum of five hundred dollars ($500.00), and likewise all its costs and charges herein in this cause laid out and expended and taxed at $—.

Certificate.

STATE OF INDIANA, } ss:
Madison County, }

In the Madison Circuit Court.

STATE OF INDIANA, for the Use of MADISON COUNTY, }
vs.
THE OHIO OIL COMPANY. }

I, Edmund Johnson, clerk of the Madison circuit court of the county of Madison, in the State of Indiana, hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the order-book entries, papers and pleadings, rulings of the court, and the objections and exceptions thereto in the above-entitled cause, as the same appear of record and on file in my office.

14 In testimony whereof I have hereunto affixed the seal of said court and subscribed my name, at Anderson, Indiana, this 18th day of April, 1898.

[SEAL.] (Signed) EDMUND JOHNSON, *Clerk.*

15 *Assignment of Errors.*

THE STATE OF INDIANA:

In the Supreme Court.

THE OHIO OIL COMPANY, Appellant,
vs.
THE STATE OF INDIANA, for the Use of MADISON COUNTY, Appellee.

The appellant, The Ohio Oil Company, says there is manifest error in the proceedings and judgment in the foregoing cause, in this, namely:

1. The court erred in overruling the demurrer separately to each paragraph of the complaint.

2. The court erred in sustaining the demurrer to the answer.

For which errors appellant prays the judgment be in all things reversed.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Appellant.

Joinder.

The appellee says there is no error in the record.

W. A. KETCHAM,
Attorney General.

C. C. SHIRLEY,
MERRILL MOORES,
Of Counsel for the State.

Agreement to Submit.

It is agreed that this cause may be submitted.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
For Appellant.
W. A. KETCHAM, *Attorney General.*
MERRILL MOORES,
C. C. SHIRLEY, *Of Counsel.*

16 And on April 20, 1898, appellant, by counsel, files its brief in this cause herein.

And on the same day the appellee, by counsel, files its brief in the above-entitled cause herein.

And thereupon appellant's counsel file a motion to advance and joinder.

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And on April 21, 1898, the court advanced the cause herein.

And on April 21st, 1898, being the 130th judicial day of the November term, 1897, the court, being advised in the premises, affirms the above-entitled cause, with an opinion *per curiam*, in the words and figures as follows:

Opinion.

THE OHIO OIL CO.
vs.
THE STATE OF INDIANA. } No. 18601.

From the Madison circuit court.

Per Curiam:

The questions presented by the record in this case are identical with some of the questions considered and decided in the case of The State *vs.* Ohio Oil Co., — Ind., —; 49 N. E. Rep., 809, and on the authority of that case the judgment herein is affirmed.

16½ It is therefore considered by the court that the judgment of the court below in the above-entitled cause be in all things affirmed at the cost of the appellant; all of which is ordered to be certified to said court.

And it is further considered by the court that the appellee recover of the appellant the sum of $— for its costs and charges in this behalf expended.

17 THE STATE OF INDIANA
vs.
THE OHIO OIL CO. } No. 18476.

From the Madison circuit court.

MCCABE, *J.*:

The State of Indiana, by her attorney general and the prosecuting attorney in the Madison circuit court, brought suit against the appellee, The Ohio Oil Company, seeking to enjoin it from wasting natural gas.

The circuit court sustained the defendant's demurrer to the complaint for want of sufficient facts to constitute a cause of action, and, the plaintiff electing to abide said demurrer and refusing to amend its complaint or to plead further, the court rendered judgment that the plaintiff take nothing by its complaint, and that defendant recover costs. Upon this ruling alone the State assigns error.

The substance of the complaint is that for many years heretofore there has been underlying Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells, and other counties in Indiana a large deposit of natural gas, utilized for fuel and light by the people of those counties and of many other counties and cities in Indiana, including Indianapolis, Ft. Wayne, Richmond, Logansport, Lafayette, and others of the most populous cities of the State, to which cities the gas is conducted, after being brought through

wells to the surface of the ground, by pipes and conduits, by means of which many hundreds of thousands of the people of Indiana are supplied with gas for light and fuel. The natural gas underlying the counties named and other portions of Indiana is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir in which the gas is confined under great pressure and from which it escapes, when permitted to do so, with great force. The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural-gas deposit to the State and its citizens is many millions of dollars. Since the discovery of the gas deposit in 1886 vast sums of money have come into the State and have been invested in building up large manufacturing interests, and vast sums of
18 money belonging to the people of Indiana have been invested in similar enterprises, causing a great increase of population, principally in the territory underlying which gas is found. Many cities in and adjacent to the gas territory, including those named, are almost wholly dependent for fuel supply upon natural gas, and for that reason the people of Indiana have become and are greatly interested in the protection and continued preservation of the gas supply. Many millions of dollars invested in manufacturing and other properties in and near the gas territory are wholly dependent for their continued operation and for the permanent value of their property upon the gas supply. Their location and establishment in the gas territory was due to the presence of natural gas underlying it, without which such enterprises could not be operated at a profit, and in the event that the supply of gas is exhausted in the territory many of such manufacturing enterprises (in which thousands of citizens of Indiana find employment at remunerative wages) will be compelled to suspend operations. Their employés will be thrown out of employment and many of them, being wholly dependent upon their labor for support, may and will become charges upon the State and its municipal subdivisions. The property of the manufacturing enterprises and the vast investments depending on them and related to them will become worthless and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now invested in these enterprises. In the cities named and in all the territory known as the "gas belt" the inhabitants have for years used practically no other fuel than natural gas. Their houses in many instances are constructed with a view to the use of natural gas and will have to be differently equipped before other kinds of fuel can be used. The cost of natural gas as fuel to the people in the gas belt, who number several hundreds of thousands, is very much less than that of any other fuel that has ever been or can be procured by them, and to the other inhabitants of the State using natural gas it has become and is a source of great convenience, comfort, and increased happiness because of its cheapness, convenience, and cleanliness as fuel. Many small villages in and near the gas territory have within a few years become flourishing and opulent cities. The State's wealth and its revenues derived from taxation on

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-count of such increased population and the various interests
19 that have been fostered and supported by natural gas *ahev*
been greatly increased, and will, in the event gas is exhausted, be correspondingly curtailed. The State of Indiana, relying upon the permanent supply of gas, has, at great expense, equipped many of its public institutions, including the state-house, the Central and other hospitals for the insane, the asylums for the blind and deaf and dumb, the Institution for the Care of the Orphans of American Soldiers and Sailors, and other public institutions owned and maintained by the State of Indiana and its various subdivisions, together with the court-houses in many counties and a vast number of public schools, for the use of natural gas as fuel, by which the cost of maintaining the public buildings and institutions named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased. Natural gas exists in large reservoirs, or a series of reservoirs connected with each other, underlying the gas territory, and the diminution or consumption of natural gas taken from any part of them affects or reduces correspondingly the common supply. If the gas supply is accordingly husbanded and protected it will last for many years and continue to supply the various interests named with abundant fuel, and the population, wealth, and other material interests of the State will continue to be benefitted and enhanced, and the comfort, enjoyment, and happiness of the people of the State greatly increased.

It is charged that about May 25th, 1897, the Ohio Oil Company, an Ohio corporation, as its name implies, caused a well to be drilled near Alexandria, Madison county, which produces natural gas and petroleum in large quantities. The location of this well is described, as well as that of five other wells drilled at about the same time as the one first named, all of which produce both natural gas and petroleum, and have done so ever since their completion. It is charged that, instead of securely anchoring the wells as drilled, so as to confine the gas produced by them within two days next after their completion, the defendant, ever since the completion of the wells, which have been completed for some time, has "unlawfully per-
mitted the gas produced therein to flow and escape into the
20 open air, whereby many millions of cubic feet of natural gas have been wasted and lost, and whereby the State's supply of natural gas has been greatly diminished, and the property of its citizens within the said gas territory dependent upon the continued supply of natural gas for fuel, as aforesaid, has been greatly damaged and decreased in value." It is also charged that the defendant avows its purpose to permit the gas to escape continuously and indefinitely hereafter from said wells, and refuses to make any effort to confine it, and declares its purpose to drill other wells in the gas territory, and permit the gas therefrom to flow and escape into the open air, and that if the gas continues to flow from the wells the supply of natural gas upon which the citizens of the State depend will be greatly diminished; that the pressure of gas as found in said Trenton rock will be greatly diminished, and that

by the diminution of such pressure water will accumulate in the rock stratum and ultimately and entirely displace and overcome the gas supply; that because of the wrongful acts of the defendant above described heretofore committed and now continuing its property and that of its citizens has been and will continue to be essentially interferred with, and the comfortable enjoyment of the lives of its citizens greatly interrupted; and plaintiff avers "that it has no adequate remedy at law for the redress of its grievances complained of; that it is impossible accurately to fix in dollars and cents the damage the plaintiff has sustained and will sustain by reason of the wrongful and unlawful acts of the defendant, if suffered to continue, and that the plaintiff's injuries on account thereof are and will be great and irreparable, and increase as said gas is permitted to flow and the number of wells wherein the same is unconfined continues to increase, and that the ordinary remedies, though repeatedly resorted to by plaintiff, have proved ineffectual to restrain or check the wrongful action of defendant."

It is charged that the penalties provided by law for the unlawful acts above described are whol-y inadequate, and that the defendant has openaly defied and continues to defy the lawfully constitute d authorities of the State in their efforts to enforce and recover in t he name of the State the penalties provided by law for such wrongfu l acts committed by the defendant, and the injunctive relief is nec - essary in order to restrain the continued wrongful acts of the de-
fendant, and that, unless the same is given, one of the greatest
21 natural resources of the State will be ultimately destroyed; that in order to obtain even a partial and inadequate remedy for the wrong done a multiplicity of suits must be resorted to, entailing great expense and affording no considerable relief, unless the defendant is restrained and prohibited by injunction from doing the things complained of.

It is therefore prayed that upon final hearing the defendant and its agents, servants, and employés be perpetually enjoined and prohibited from further suffering and permitting the natural gas produced in said wells or any of them to escape from them, and that the defendant be ordered and directed forthwith to securely confine the same, either by anchoring each of the wells or by confining the gas in tanks, pipes, or other proper receptacles, and that failing to do so the sheriff of Madison county be ordered to anchor, secure, and confine the natural gas in each of said wells, and that the expense of such anchoring be taxed as part of the cost of suit.

It is intimated by appellee's learned counsel that the State has nor right to maintain such a suit; but whether it be on account of lack of capacity to sue or simply because the complainant does not state facts sufficient is not made plain by the argument of appellee's counsel. If it was the intention to question the capacity of the State to sue, counsel should have embraced in the demurrer the second statutory ground for demurring, namely, "that the plaintiff has not legal capacity to sue." Sec. 342, Burns' R. S., 1894 (sec. 339, R. S., 1881; *ib.*, Horner's R. S., 1897).

But the courts of the State and United State- are open to the State,

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both in its sovereign capacity and by virtue of its corporate rights, in both of which characters it sued here.

Indiana *vs.* Kentucky, 136 U. S., 479.
Indiana *vs.* Woram, 6 Hill, 33; 40 Am. Dec., 378.
State *vs.* Portsmouth Savings Bank, 106 Ind., 435.
State *vs.* Adams Express Co., 144 Ind., 549.
Adams Express Co. *vs.* Indiana, 165 U. S., 255.
State *vs.* Chicago & E. I. R. R. Co., 145 Ind., 229.
State *vs.* Union Nat'l Bank of Muncie, 145 Ind., 537.
State *vs.* Western U. Tel. Co., 146 Ind., 54.
23 Am. & Eng. Ency. of Law, p. 80.

22 The appellee contends that "the question of the exhaustion of the gas is certain, according to the averments in both the injunction cases, and the question therefore is, Who shall be permitted to exhaust it?" "The State contends," says appellee, "that the manufacturers and gas companies shall be allowed that privilege for the purpose of bargain and sale, although it incidentally avers benefit to the people, and all this to the exclusion of an oil company who is also using gas for the purpose of a legitimate business. In such matters of private concern the State has no interest and should not have any."

It is true the production of oil is a legitimate business; but the waste and destruction of natural gas, which appellee's demurrer admits it is engaged in, defiantly, constantly, and in utter contempt of the laws of Indiana and the welfare and comfort of its citizens, is not only not a legitimate business, but has been placed under the ban of two prohibitory statutes in this State. Secs. 2316-2318, Burns' R. S., 1894 (Acts 1891, p. 55; Acts 1893, p. 300). Section 1 of the latter act provides "that it shall be unlawful for any person, firm, or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes or other safe receptacle for a longer period than two (2) days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other safe and proper receptacles."

The constitutionality of the latter act is assailed by the appellee; but the former act, being very much of the same nature as regards its constitutionality as the latter, was assailed by the appellant in Townsend *vs.* State, — Ind., —, 47 N. E., 19, for every conceivable constitutional objection and for every objection urged to the act now under consideration, and this court in that case upheld the constitutionality of that act.

It is asserted with great confidence that the gas in or under the appellee's land is a part of the land, and that it is a reasonable
23 use thereof to mine for the oil therein, even though gas is thereby incidentally wasted by permitting its escape into the open air, and that a statute prohibiting such a reasonable use is unconstitutional, and several Pennsylvania and Ohio cases are cited,

together with one from New York and one in West Virginia, to the effect that petroleum is a mineral, and while it is in the earth it is a part of the realty, and that when it reaches a well and is produced on the surface it becomes personal property and belongs to the owner of the well. It is therefore argued that natural gas is likewise a part of the land in or under which it is found, and that the owner of the land may and has a lawful right to assert absolute dominion over all that is found in or under his land to the center of the earth and for an unlimited distance upwards from the surface. The force of these authorities depends entirely upon the analogy between oil or petroleum and natural gas in or under the land. It must be confessed that there is a marked difference between these two sub-tances in their nature. This court has likened natural gas as to its property characteristics to fish in the waters and wild game in the forest before taken and reduced to possession.

Townsend *vs.* State, *supra*, and cases there cited.

But appellee's learned counsel rely on a quotation made by this court in the latter case from the Pennsylvania supreme court and which had in a gas case been previously quoted by this court—the People's Gas Co. *vs.* Tyner, 131 Ind., 281. That quotation is as follows: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' They belong to the owner of the land and are a part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land or come under another's control the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas so that it comes into his well and under his control, it is no longer yours but his."

24 The part of this quotation that seems favorable to appellee's contention is this: "They (the water, gas, and oil) belong to the owner of the land and are a part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land or come under another's control the title of the former owner is gone." This much of the quotation was not adopted as law by this court in either of the cases in which the quotation is found. On the contrary, in the latter case, this court said: "By the Tyner case, 131 Ind., 281, 282, this court likened natural gas and laws regulating the same to wild animals and laws regulating the taking of such animals. The supreme court of Minnesota, in State *vs.* Rodman, 58 Minn., 393, having under consideration the constitutionality of a certain game law of that State, said: 'We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common. The preservation

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of such animals as are adapted to consumption as food or to any other useful purpose is a matter of public interest, and it is within the police power of the State, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession;'" and this court in the same case also likened natural gas and its characteristics as property to fish and the laws regulating the taking thereof. There is no such thing in such laws, either as to wild animals or fish, to the effect that they become the property of the owner of the land on which the animals are found or in the waters of which the fish are found, and there is no such thing in such laws to the effect that after the title has once vested by actual reduction to possession that the same may wander off and vest in some one else. To say that the title to natural gas vests in the owner of the land in or under which it exists today, and that tomorrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd and contrary to all the analogies of the law than to say that wild animals or fowls in "their fugitive and wandering existence" in passing over the land become the property of the owner of such land, or that fish in their passage up or down a stream of water become the property of each successive owner over whose land the stream passes. It is as unreasonable and untenable as to say that the air and the sunshine which float over the owner's land is a part of the land and is the property of the owner of the land. We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and therefore that the act from which we have quoted is not violative of the constitution as an unwarranted interference with private property.

But appellee's counsel contend that a proper construction of the act makes it wholly inapplicable to the subject of this suit, the prevention of the waste of gas; that it does not apply to a well unless it endangers persons or property. It is not in the language of the act that counsel claim to find this meaning, but they claim to find it in the preamble thereto, reading thus: "Whereas great danger to life and injury to persons and property is liable to result from the improper, unsafe, and negligent sinking, maintenance, use, and operation of natural gas and oil wells, therefore," etc. It is not claimed, as it cannot with reason be, that the language of the act is either ambiguous or doubtful in its meaning. It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil; and if, on review of the whole act, a wider intention than that expressed in the preamble appears to be the real one,

effect is to be given to it, notwithstanding the less extensive import of the preamble.

23 Am. & Eng. Ency. of Law, 331, 332, and authorities there cited.
Holbrook *vs.* Holbrook, 1 Pick., 251.
Erie, etc., R. R. Co. *vs.* Casey, 26 Pa. St., 288.
Yazoo, etc., C. Co. *vs.* Thomas, 132 U. S., 174.
26 Hughes *vs.* Done, 1 Q. B. (1 A. & E. N. S.), 301.

In Yazoo, etc., Co. *vs.* Thomas, *supra*, the Supreme Court of the United States said: "The preamble to the act is referred to by counsel as sustaining their construction, because it is therein declared that the work is one 'of great public importance' and 'to be encouraged by legislative sanction and liberality,' and 'that the physical difficulties of constructing and maintaining railroads to, across, along, or within either the Mississippi, Sunflower, Deer Creek, or Yazoo bottoms or basins or other alluvial lands herein referred to are such that no private company has so far been able to establish a railroad and branches, developing said basins and alluvial lands and connecting them with the railroad systems of the country;' but as the preamble is no part of the act and cannot enlarge or confer powers nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up."

We have no doubt, from the language of the act and the circumstances surrounding its enactment, that the chief object in the passage thereof was to prevent the waste of natural gas.

23 A. & Eng. Ency. of Law, 335, 336.
Edger *vs.* The Board, 70 Ind., 331.
Stout *vs.* Board, 107 Ind., 343.
May *vs.* Hoover, 112 Ind., 455.
Hunt *vs.* R. R. Co., 112 Ind., 69.

It is contended that the act does not apply to appellee's case, because it was intended, as is claimed, to apply only to wells producing oil alone and to wells producing gas alone and not to what counsel call combination wells, producing both oil and gas, as is the case with the appellee's wells, as disclosed in the complaint. At the time of the passage of the act the chief waste of natural gas which was going on and had been for some time, as shown by the Eleventh Annual Report of the United States Geological Survey for 1889–1890 and the current history of the times, resulted from what counsel term combination wells, producing both oil and gas; the waste from wells producing gas alone was small in compari-
27 son with that from such combinations wells. In the light of these historical facts it would be extremly absurd to suppose that the legislature intended to prevent waste only by closing the spigot and leaving the bung wide open; but even the language of the statute forbids such construction. The act made unlawful by the express words of the section quoted is "to allow or permit the

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flow of gas or oil from any such well to escape into the open air." In this sentence there is but one well spoken of. The prohibition is against the escape of gas, and it is undeniable that it is equally against the escape of oil, and it is equally clear that the prohibition against the escape of both relates to the same well, and therefore, if they are both permitted to escape from the same well, the permission of the escape of each is made unlawful by the section quoted. Had the statute made the violation thereof a crime, would any rational being contend that an indictment charging the accused with permitting both oil and gas to escape from such well would not be good? Certainly not.

It is next contended that there is not authority or right of action in the State at common law, and especially that the State cannot maintain a suit in equity, either under the statute or at common law. This being a suit in equity, as the law existed prior to the adoption of the civil code of 1852, if the objection last mentioned be well taken, it is fatal to the complaint.

The reason assigned in argument why the State cannot maintain the action for an injunction is that the statute provides a different remedy, namely, the recovery of a penalty of $200.00 for each violation of the act, and a further penalty of $200.00 for each ten days during which such violation shall continue, to be recovered in a civil action in the name of the State, for the use of the county in which such well is located, with attorneys' fees and costs of suit; and another remedy provided in another section of the act is that certain persons in the vicinity are authorized to go upon the land where any well is situate, from which gas or oil is allowed to escape in violation of the act, and shut up the same and pack and tube said well so as to prevent *to* escape of gas or oil, and maintain a civil
28 suit against the owner for the costs of such closing of said well, with attorneys' fees and costs of suit; but this court has gone much further than to hold that the fact that the civil remedy given to recover penalties and the other remedies for violations of the act does not bar the right to an injunction.

In the case of The People's Gas Co. *vs.* Tyner, *supra*, it was said: "No authority has been cited and we know of none supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitro-glycerine within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself and not sustained by the public in general."

In that case it was held that the extraordinary equitable remedy by injunction could be invoked by a private citizen, even though the act to be enjoined was made a crime by statute; and the same rule was applied in The Columbian Athletic Club *vs.* The State, 143 Ind., 98, where this court said: "Extraordinary emergencies in many cases call for extraordinary remedies. * * * The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham, 'that it is the duty of courts in equity (and the same is true of all courts and all institutions) to adapt its prac-

tice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases, which, the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is no other remedy.' This rule, the author (Judge Redfield) concludes, is certainly worthy of one of the ablest, wisest, and best judges that ever administered the chancery law of England or America."

Our code provides that " whatever is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property, so as ennentially to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an ac-
29 tion. * * * The nuisance may be enjoined or abated and damages recovered therefor " (§§ 290, 292, Burns' R. S., 1894; §§ 289, 291, R. S., 1881; *ib.*, Horner's R. S., 1897). The facts alleged in the complaint show that the acts of the appellee are such as to essentially interfere with the comfortable enjoyment of life and the property of the citizens of the State.

The supreme court of Kansas, in State *vs.* Crawford, 28 Kansas, 720, said: "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance." The demurrer to the complaint admits that the wells of the appellee are in this catagory.

The supreme court of California, in a suit by the attorney general to enjoin the Truckee Lumber Company from discharging sawdust into the Truckee river with the effect of destroying the fish therein, in sustaining the action, which is closely ananagous to this action, *the court* used the following language, which we adopt: "It is alleged that the acts of the defendant have the effect of poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is 'an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or any considerable number of persons' is a public nuisance. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the State (*Ex parte* Maier, 103 Cal., 476; 42 Am. St., 129), as in England it was in the King, and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law and preserved and expressly provided for by the statutes of this and every other State in the Union. The complaint shows that by the repeated and continuing acts of defendant this public property right is being and will continue to be greatly interfered with and impaired, and that such acts constitute a nuisance, both under our statute and at com-
mon law, is not open to serious question (People *vs.* Elk River,
30 etc., Co., 107 Cal., 219; 48 Am. St., 121). * * * The dominion of the State for the purpose of protecting its sovereign rights in the fish within its waters and their preservation for

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the common enjoyment of its citizens is not confined within the narrow limits suggested by the defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the State, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the State. * * * While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. * * * The fact that acts of the character alleged are by the penal code made a misdemeanor and punishable as such does not make them less a nuisance nor imply that the legislature intended to make the criminal remedy exclusive of the civil; nor is there anything in the objection that the attorney general is not privileged to maintain the action upon his own information without the intervention of a private relator." People *vs.* Truckee Lumber Co., 116 Cal., 397. The same doctrine is laid down in—

People *vs.* City of St. Louis, 10 Ill., 351.
Commonwealth *vs.* Pittsburgh, etc., R. R. Co., 24 Pa. St., 159.
State *vs.* Matschan (Ore.), 46 Pac., 791.

In the 24 Pa. St. case, *supra*, it was said: "The matter complained of is an invasion of a public highway, and it must be enjoined against. The defendants are not allowed the excuse that this part of the canal is practically abandoned, for no neglect is chargeable against the State; its officers are insisting on its rights, and it is the merest effrontery in the defendants to set up their views of the need of the canal against the State which thought fit to
31 make it and against the public officers who are entrusted with its custody. It is therefore ordered that an injunction issue."

The State of South Carolina brought suit in one of its courts to enjoin the Coosaw Mining Company from digging, mining, or removing phosphate rock and phosphatic deposits from the bed of the river. On petition of the mining company the case was removed into the circuit court of the United States. From the decree of that court the mining company appealed to the Supreme Court of the United States. That court, in affirming the judgment of the circuit court awarding an injunction, said: "An instructive case upon this subject is Attorney General *vs.* Jamaica Pond Aqueduct, 133 Mass., 361, 363, 364*a*. That was an information in equity in the name of the attorney general to restrain a corporation from doing certain illegal acts, the necessary effects of which would be not only to impair the rights of the public in the use of one of the great ponds of Massachusetts for the purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores

slime, mud, and offensive vegetation detrimental to the public health. It was held, upon the authority of numerous cases, American and English, that where the nuisance is a public one an information by the attorney general was the appropriate remedy. After observing that the preventive force of a decree in equity restraining the illegal acts before any mischief was done would give a more efficacious and complete remedy than an indictment or proceedings under a statute for the abatement of the nuisance, the court said: 'There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. * * * If a corporation or an individual is found to be doing acts without right the necessary effect of
32 which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney general to restrain and prevent the mischief.' So in Eden on Injunctions: 'The usual and perhaps the more correct mode of proceeding in equity in cases of public nuisance is by information at the suit of the attorney general,' p. 267. Mr. Justice Story said that an information in equity at the suit of the attorney general would lie in cases of purpresture and public nuisance, the jurisdiction of courts of equity being sustained because of 'their ability to give a more complete and perfect remedy than is attainable at law in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations.'

Eq. Jur., §§ 922, 923, 924.
The People *vs.* Vanderbuilt, 26 N. Y., 287.
District Attorney *vs.* Lynn & Boston R. R. Co., 16 Gray, 242, 245.
Kerr on Injunctions, 262, 263.
1 Joyce on Injunctions, 120.

These principles are applicable to the present case. The remedy at law for the protection of the State in respect to the phosphate rocks and phosphatic deposits in the beds of its navigable waters is not so efficacious or complete as a perpetual injunction against interference with its rights by digging, mining, and removing such rocks and deposits without its consent. The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust for an indefinite period by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or

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present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are
33 entitled to have is security for all time against illegal interference with the control by the State of the digging, mining, and removing of phosphate rock and phosphatic deposits in the bed of the Coosaw river. Such security was properly given by the decree below. Decree affirmed." Coosaw Mining Co. *vs.* South Carolina, 144 U. S., 566.

Accordingly, in Crawford *vs.* Tyrrell, 128 N. Y., 344, it was held: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained and for an injunction against the continued use of his premises in such a manner." And in Mobile *vs.* Louisville & Nashville R. R. Co., 84 Ala., 115, 126, it was held that "the mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

It has been held that the United States, in its sovereign capacity, may enjoin hydraulic mining to the detriment of navigable streams. United States *vs.* N. Bloomfield Gravel Mining Co., 81 Fed., 243.

In a case where the State officers failed to enforce the law against brokerage in railroad tickets the railroads brought suit in the circuit court of the United States to enjoin the brokerage business as unlawful. The circuit court of the United States for the middle district of Tennessee granted the injunction, and, in answering the objection that such a proceeding was novel and unprecedented, said: "I return, now, to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable
34 remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled and precedent after precedent established from time to time to meet new conditions and to do full justice until the argument has long since lost most of its force, although it is still maintained in form. It has been in answer to arguments like this that the great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion, regulated by analogy, by what would be manifestly just, in view of all the existing conditions, and requiring as a condition that there is no adequate remedy at law. Beyond this

the courts have not gone in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive; that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civi-zation. A similar objection that novel use was being made of the writ of injunction was pressed in the case of Toledo, A. A. & N. M. R'y Co. *vs.* Pennsylvania Co., 54 Fed., 751, and was answered by the court as follows: 'Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore in its time without a precedent. If based on sound principles and beneficent results follow their enforcement, affording relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.' Mr. Justice Brewer, sitting in the circuit court for Nebraska, said: 'I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasing complex business relations and the protection of rights can demand.' Mr. Justice Blatchford, speaking for the Supreme Court in Jay *vs.* St. Louis, 138 U. S., 1, said: 'It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation.'" Nashville, C. & St. L. R'y Co. *vs.* McConnell, 82 Fed., 76. To the same effect is our own case of The Columbian Athletic Club *vs.* State, *supra*.

It is true that, as a result of the principles announced in the previous part of this opinion, natural gas, when reduced to actual possession by the land-owner, when drawn into his well, pipes, tanks, or other receptacles, thereby becomes his personal property, subject to his dominion; but, as said by this court in People's Gas Co. *vs.* Tyner, *supra*, "the rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others."

Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind.

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But appellee tries to excuse its conduct on the score that it cannot mine and utilize the oil under and in its land without wasting the gas; but there is nothing in the record to bear out that claim. However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the
36 storehouse of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well-being of society than any other of the bounties of the earth.

Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom and utilize it without wasting the oil; but, even if it cannot draw oil from such wells without wasting gas and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana and, in effect, says: "It is my property to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana help yourselves if you can. What are you going to do about it?"

We had petroleum oil for more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State; but we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless.

We therefore conclude that the facts stated in the complaint
37 make a case of public nuisance, which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action; hence the circuit court erred in sustaining appellee's demurrer to the complaint.

The judgment is reversed and the cause remanded with instructions to overrule said demurrer and require the defendant to answer the complaint, and for further proceedings in accordance with this opinion.

38 And afterwards, to wit, on the 28th day of April, 1898, came the appellant, by counsel, and filed its petition for a writ of error to the Supreme Court of the United States in the words and figures following, to wit:

39 In the Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON County. } No. 18601.

Now comes the said The Ohio Oil Company and shows to this honorable court that heretofore, to wit, on the 16th day of August, 1897, the said State of Indiana, for the use of Madison County, filed its complaint against said The Ohio Oil Company to recover an alleged penalty for allowing natural gas to escape from certain oil wells owned by the said Ohio Oil Company in said county of Madison, in the State of Indiana, which said action was so brought and prosecuted under and by virtue of an act of the General Assembly of the State of Indiana approved March 4, 1893, which said act of the legislature, among other things, required every owner of any natural gas or oil well to confine the gas within such well within two days after the same should have been struck in the well, and that thereafter all such gas or oil should be safely and securely confined in such well, pipes, or other safe and proper receptacles.

40 That in said circuit court of Madison county, Indiana, upon demurrer to said complaint, the plaintiff in error contended that said act of the General Assembly of the State of Indiana was in violation of the 14th amendment to the Constitution of the United States, in that it takes away the liberty and property of the Ohio Oil Company without due process of law, *by* the circuit court of Madison county adjudged the said act of the legislature of Indiana to be not in violation of said 14th amendment to the Constitution of the United States and overruled the demurrer to said complaint.

That afterwards, on the 2nd day of April, 1898, said The Ohio Oil Company filed its answer in said case showing that the said act of the legislature of Indiana was in violation of the Constitution of the United States in this, that the enforcement of said statute operated to deprive said The Ohio Oil Company of its property, to wit, the oil in said lands and the use thereof, without due process of law, and that the production of oil was an impossibility in said lands without allowing said gas to escape; which answer was in these words:

41 Now comes the defendant, The Ohio Oil Company, and for its answer to the complaint herein says it is a corporation duly organized under the laws of Ohio, and duly complied with all the laws of Indiana with respect to doing business in this State before the bringing of this suit; that this action is prosecuted under and

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by virtue of an act of the General Assembly of the State of Indiana approved March 4th, 1893; which said act is in these words:

42 An act concerning the sinking, safety, maintenance, use, and operation of natural gas and oil wells, prescribing penalties and declaring an emergency.

(Approved March 4, 1893.)

Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural gas and oil wells; therefore,

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacles for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well pipes or other safe and proper receptacles.

SEC. 2. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one-half inch as great as the hole of such well, to extend at least three feet above the salt-water level, where salt water has been struck; where no salt water has been struck such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been "shot," the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone and dry cement, so as to form a concrete up to a point at least eight feet above the top of the gas or oil bearing rock or rocks and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid, which shall be properly rammed as aforesaid. The casing from the well shall then be

pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball, eight inches in diameter, shall be dropped in the well and securely rammed into the shale by the driller or owner of the well, after which not less than one cubic yard of sand pumping or d-illing taken from the well shall be put on top of said iron ball.

43 SEC. 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which such violation shall continue; and all such penalties shall be recoverable in a civil action or actions in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and cost of suit.

SEC. 4. Whenever any person or corporation in possession or control of any well in whic- natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section one of this act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this State against the owner, lessee, agent or manager of said well, and each of them jointly or severally to recover the costs and expense of such tubeing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

SEC. 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section two of this act, any person or corporation lawfully in possession of lands adjacent to, or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situated and take possession of such well, and plug and fill the same in the manner provided by section two of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporations so failing, jointly and severally, to recover the costs and expense of such plug-ing and filling, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

44 This defendant, further answering, says that before and at the time of the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor into the earth and rock below in said county of Madison, and that in the carrying on of said business it had expended many thousand of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells, and for pipes and pipe lines, all of which it then owned and still owns.

The defendant admits that it drilled the well complained of

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herein, but says that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing and transporting natural gas in said county, having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same, as so constructed and operated, is not dangerous to life or property.

That said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land-owner the stipulated royalties therefor, and so operated the same with the knowledge, approbation, and consent of such land-owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action; all of which was so done under and by virtue of a lease to defendant by the owner of said land, granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

45 That in said well and in the same strata of rock whence such oil was produced there *was* also found at said time quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force, and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural, and ordinary method of raising and saving oil in such cases.

And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed, and the people of said county and State will be deprived of use and profits of such oil, which is vastly of more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring territory, in equipping said plant, in constructing such oil line, and in incurring the liabilities and paying the money

therefor, as hereinbefore alleged, all with the knowledge and acquiescense of the plaintiff and with no notice of knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money has been so expended and after said well had been so completed.

46 That in the territory where said well complained of is situate there are a number of paying oil wells owned and operated by various persons and corporations, and said field when properly developed may reasonably be expected to be a large one for the production of oil, which will be and is of great value to the people of said county.

This defendant further alleges that said act of the General Assembly of the State of Indiana, as above set out, violates the fourteenth amendment of the Constitution of the United States, in this: that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the law.

Wherefore defendant prays judgment for its costs and all other proper relief.

47 But the said circuit court of Madison county, Indiana, on the 2nd day of April, 1898, sustained the demurrer to said answer and rendered judgment against said The Ohio Oil Company for the penalty provided by said statute, to wit, in the sum of five hundred dollars. From said judgment of said circuit court said The Ohio Oil Company appealed to the supreme court of Indiana, in which last-named court, on the 21st day of April, 1898, the said supreme court of Indiana affirmed the judgment of the said Madison circuit court, and held and decided that the said act of the General Assembly of the State of Indiana was constitutional in all respects; that said statute was valid and did not deprive the plaintiff in error of the liberty or property without due process of law.

And your petitioner shows to this honorable court that the said several judgments and decrees of said circuit court and of the said supreme court of the State of Indiana are manifestly erroneous in deciding that the said statute of the State of Indiana does not deprive the plaintiff in error of liberty and property without due process of law, and it therefore prays that this honorable court issue its writ of error directed to the honorable the judges of the supreme court of the State of Indiana, requiring them, the said judges, to send up to the Supreme Court of the United States a complete record of the said cause.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Ohio Oil Company.

48 And be it further remembered that on the same day said petition was granted and said writ of error allowed as prayed for by the order of the Honorable Timothy E. Howard, chief justice of said court, made and entered in said cause in these words:

"Allowed by Timothy E. Howard, chief justice of the supreme court of Indiana."

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49 And on the same day came the appellant, by counsel, and filed its certificate of the chief justice of the supreme court of Indiana in the words and figures following, to wit:

50 STATE OF INDIANA, ss:

In the Supreme Court of Indiana.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON COUNTY. } No. 18601.

I, Timothy E. Howard, chief justice of the supreme court of Indiana, do hereby certify that in the above and foregoing cause, wherein final judgment was rendered in the supreme court of Indiana on the 21st day of April, 1898, that in said cause there was involved, discussed by counsel, and decided by this court the question whether the act of the General Assembly of the State of Indiana, approved March 4, 1893, entitled "An act concerning the sinking, safety, maintenance, use, and operation of natural-gas and oil wells, prescribing penalties and declaring an emergency," was in violation of the 14th amendment to the Constitution of the United States, and that in such decision the supreme court of the State of Indiana in the cause aforesaid and at the time aforesaid held and decided that the said act of the General Assembly was a valid statute and that the same was not in conflict with the 14th amendment to the Constitution of the United States.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court the 28th day of April, 1898.

TIMOTHY E. HOWARD,
[SEAL.] *Chief Justice.*

51 And on the same day came the appellant, by counsel, and filed its citation and service in the words and figures following, to wit:

52 UNITED STATES OF AMERICA:

To the State of Indiana, for the use of Madison County, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Indiana in a cause wherein The Ohio Oil Company is the plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Timothy E. Howard, chief justice of the supreme court of Indiana, this 28th day of April, in the year of our Lord 1898.

TIMOTHY E. HOWARD,
Chief Justice.

Service of foregoing citation is hereby acknowledged.
April 28, 1898.

W. A. KETCHAM,
Attorney General of Indiana.

MERRILL MOORES,
Of Counsel for the State.

53 And on the same day came the appellant, by counsel, and filed its appeal bond herein in the words and figures following, to wit:

54 In the Supreme Court, *ss:*

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON County. } No. 18601.

Know all men by these presents that the undersigned, The Ohio Oil Company, as principal, and George Shirts, as surety, are held and firmly bound unto the State of Indiana, for the use of Madison County, in the sum of twelve hundred ($1,200) dollars upon the following conditions:

That whereas on the second day of April, 1898, *in* the Madison county circuit court, — the said State of Indiana, for the use of Madison County, rendered judgment against the said The Ohio Oil Company in the sum of five hundred ($500) dollars and costs, from which judgment said The Ohio Oil Company appealed to the supreme court of Indiana; and

Whereas on the twenty-first day of April, 1898, the said judgment of the Madison circuit court was affirmed by the supreme court of Indiana, from which said judgment the said The Ohio Oil Company has prayed for a writ of error to the Supreme Court of the United States:

Now, therefore, if said The Ohio Oil Company shall well and truly prosecute its said writ of error to the Supreme Court of the United States and shall pay any judgment that may be rendered by said Supreme Court of the United States in said case, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Witness our hands and seals this 28th day of April, 1898.

THE OHIO OIL COMPANY.
GEO. SHIRTS.

Taken and approved by me this 28th day of April, 1898.

TIMOTHY E. HOWARD,
Chief Justice of the Supreme Court of Indiana.

55 And on the 16th day of May, 1898, came appellant, by counsel, and filed its writ of error herein in the words and figures following, to wit:

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56 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a *a* judgment in a plea which is in the said supreme court, before you, between The Ohio Oil Company and The State of Indiana, for the use of Madison County, a manifest error hath happened, to the great damage of the said Ohio Oil Company, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said [SEAL.] circuit court this 16 day of May, A. D. 1898.

NOBLE C. BUTLER, *Clerk.*

57 And on the same day appellant, by counsel, filed its assignment of errors to the Supreme Court of United States, together with a joinder therein by appellee, in the words and figures following, to wit:

58 In the Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of MADISON COUNTY. } No. 18601.

Now comes said The Ohio Oil Company and shows the court that there is manifest error in the proceedings and judgment in this case, to wit:

1. The circuit court of Madison county erred in overruling the demurrer to the first paragraph of the complaint.

2. The circuit court of Madison county erred in overruling the demurrer to the second paragraph of the complaint.

3. The circuit court of Madison county erred in sustaining the demurrer to the answer.

4. The supreme court of Indiana erred in deciding that the cir-

cuit court of Madison county committed no error in overruling the demurrer to the first paragraph of the complaint.

5. The supreme court of Indiana erred in deciding that the circuit court of Madison county committed no error in overruling the demurrer to the second paragraph of the complaint.

6. The supreme court of Indiana erred in deciding that the circuit court of Madison county committed no error in sustaining the demurrer to the answer.

7. The supreme court of Indiana erred in deciding that the act of the legislature of Indiana approved March 4, 1893, was not in violation of the 14th amendment to the Constitution of the
59 United States, and erred in deciding that said act of said legislature did not operate to deprive said The Ohio Oil Company of liberty and property without due process of law.

For all of which errors said The Ohio Oil Company prays that said judgment be in all things reversed.

M. F. ELLIOTT,
STEPHENSON, SHIRTS & FERTIG,
Attorneys for Ohio Oil Company.

The defendant in error, The State of Indiana, for the Use of Madison County, says there is no error in the proceedings and judgment in said cause.

W. A. KETCHAM,
Attorney General of Indiana.

MERRILL MOORES,
Of Counsel for the State.

60 STATE OF INDIANA:

Supreme Court.

THE OHIO OIL COMPANY
vs.
THE STATE OF INDIANA, for the Use of Madison County. } Madison C. C. No. 18661.

I, Alexander Hess, clerk of the supreme court of the State of Indiana, hereby certify that the above and foregoing transcript contains full, true, and complete copies of the record and of all the papers, entries, proceedings, and judgment in the above-entitled cause, together with a full, true, and complete copy of the opinion of said supreme court in this cause and a full, true, and complete copy of the opinion of said supreme court referred to in the opinion in this cause as the one upon which the decision in the above-entitled cause is based; also of the petition for a writ of error, allowance thereof by the chief justice of said court, assignment of errors, joinder, writ of error, citation and service, and appeal bond to the Supreme Court of the United States.

In witness whereof I hereunto set my hand and affix the seal of

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said court, at my office, in Indianapolis, this 20th day of May, 1898.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ALEX. HESS,
Clerk Supreme Court of Indiana.

Endorsed on cover: Case No. 16,894. Indiana supreme court. Term No., 310. The Ohio Oil Company, plaintiff in error, *vs.* The State of Indiana, for the Use of Madison County. Filed May 27th, 1898.

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No. 83 (and 308)

Brief of Ellis for P. E.

Supreme Court U. S.
FILED
MAR 8 1899
JAMES H. MCKENNEY
Clerk

Filed Mar. 8, 1899.

Supreme Court of the United States.

October Term, 1898, No. 310.

THE OHIO OIL COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA, FOR THE USE OF MADISON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

ARGUMENT FOR PLAINTIFF IN ERROR.

STEPHENSON, SHIEK & FEETIG,
M. F. ELLIOTT,
Attorneys for Plaintiff in Error.

APPEAL PRINTING CO., 14 Vesey Street, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 310.

THE OHIO OIL COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA, for the use of Madison County.

In Error to the Supreme Court of the State of Indiana.

BRIEF FOR THE PLAINTIFF IN ERROR.

Abstract.

On the 16th day of August, 1897, the State of Indiana for the use of Madison County in the said State, commenced this suit in the Circuit Court of the said County of Madison, to recover from the Ohio Oil Company, the plaintiff in error, the sum of $200. and costs, for violation of the provisions of the Act of Legislature of the State of Indiana, approved March 4th, 1893. The portions of said act most necessary to be considered

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in a determination of the question involved in this suit are sections one and three, which are as follows:

"Section 1 Be it enacted by the General Assembly of the State of Indiana, that it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well pipes or other safe and proper receptacles."

"Section 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which said violation shall continue; and all such penalties shall be recoverable in a civil action or actions in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and costs of suit."

The complaint alleges that the Ohio Oil Company, a corporation doing business in Madison County, State of Indiana, had in its possession and control an oil and gas well on certain real estate in said county described, on the 24th day of July, A. D. 1897, and on that day drilled and completed said well, and found oil and gas therein, and did unlawfully allow and permit the flow of gas in great quantities to escape from said oil well under its management and control, and after that day made no effort to confine said gas within the said well or in the proper pipes and tanks and safe receptacles, but permitted the same to flow from the said well and escape into the open air for more

than two days after oil and gas were struck in the same.

On the 2d day of April. 1898, the defendant filed a demurrer to plaintiff's complaint aforesaid, averring that the same did not state facts sufficient to constitute a cause of action. The said Circuit Court overruled the said demurrer and thereupon the plaintiff in error filed its answer to the complaint. In the answer the said act of March 4th, 1893 is set out in full. (See Record pages 4, 5 & 6).

The answer also set out in substance as follows: That at the commencement of the said action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock in the said County of Madison; that in its said business it had expended many thousands of dollars in leasing, drilling, purchasing machinery and equipping the same, and in the drilling of a number of oil wells, and for pipes and pipe lines, all of which it then owned and still owned at the time of the commencement of the suit. It admitted that it had drilled the well complained of, but averred that it was drilled in good faith and for the sole purpose of producing oil therefrom, it not being engaged in the business of producing or transporting gas, and having no plant for that purpose, and that such gas was only of value to it for the purpose of aiding in the production of oil. That the well was not drilled in or near any village, town or city, but in the country, and was so constructed and operated as not to injure life or property; that when said well was drilled and completed oil was found therein in paying quantities, and the defendant saved and utilized the same, paying the land owner the stipulated royalty and so operated the same with the approbation and consent of the land-owner,and was so operating the same at the time this suit was

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brought. That the operations aforesaid were carried on by virtue of a written lease to the defendant by the owner of the land made and executed before the well was drilled and that under the said lease it owned and still owns all the oil and gas in said well and in and under the land in the complaint described, and that the said well and lease are and were of great value. That in said well and in the same strata of rock whence the oil was produced, there was also found at the same time, quantities of natural gas, which by its own pressure escaped through pipes in said oil well, being the same as those through which the oil was produced and saved, and that in producing and saving such oil the defendant utilized such gas as a power, force and agency to raise the said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural and ordinary method of raising the same in such cases.

The defendant also averred in said answer that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape into the air. That if such gas should be shut in to such well, it would be impossible to raise or produce the oil from the well, and that if such course is pursued the business of the said oil company together with its said plant and property would be entirely destroyed, and that the oil and property so destroyed was of much greater value than the gas in the said well, and that with the most approved machinery and appliances known to the world, and with the employes of the highest skill, no more gas was suffered to escape from said well than was consistent with the operation of the same.

The plaintiff in error also averred in its answer that the said act of the General Assembly of the State of Indiana set out therein, violates the Fourteenth Amendment of the Constitution of the United States, under the facts set out in the answer, in that it deprives it and other oil operators similarly situated, of liberty and property without due process of law, and denies to it and others similarly situated, the equal protection of the laws.

The State of Indiana demurred to the answer aforesaid upon the ground that the same did not state facts sufficient to constitute a defence. The said Circuit Court of Madison County sustained the demurrer and final judgment was rendered against the plaintiff in error for the sum of $400., as damages and $100., for attorneys' fees and also all costs and charges.

The plaintiff in error appealed from said judgment to the Supreme Court of the State of Indiana, alleging manifest error in that the Circuit Court erred in sustaining the demurrer to its answer. On the 21st day of April, 1898, the Supreme Court of the State of Indiana affirmed the judgment of the said Circuit Court and the suit was decided adversely to the plaintiff in error, in the said Supreme Court of Indiana. (See Record page 10).

From this decision of the Supreme Court of Indiana the plaintiff in error filed its petition for a writ of error to the Supreme Court of the United States, and writ of error was granted by the Chief Justice of the Supreme Court of Indiana, the Hon. Timothy E. Howard on the 28th day of April, 1898. (See Record page 29).

Thereafter citations were duly issued and acknowledgment of service had and bond executed, duly approved by the Chief Justice of the said Supreme Court of Indiana.

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Errors Assigned.

The errors assigned in this Court are as follows:

"1. The circuit Court of Madison County erred in overruling the demurrer to the first paragraph of the complaint.

2. The Circuit Court of Madison County erred in overruling the demurrer to the second paragraph of the complaint.

3. The Circuit Court of Madison County erred in sustaining the demurrer to the answer.

4. The Supreme Court of Indiana erred in deciding that the Circuit Court of Madison County committed no error in overruling the demurrer to the first paragraph of the complaint.

5. The Supreme Court of Indiana erred in deciding that the Circuit Court of Madison County committed no error in overruling the demurrer to the second paragraph of the complaint.

6. The Supreme Court of Indiana erred in deciding that the Circuit Court of Madison County committed no error in sustaining the demurrer to the answer.

7. The Supreme Court of Indiana erred in deciding that the act of the Legislature of Indiana approved March 4, 1893, was not in violation of the 14th Amendment to the Constitution of the United States, and erred in deciding that said Act of said Legislature did not operate to deprive said The Ohio Oil Company of liberty and property without due process of law.

For all of which errors said The Ohio Oil Company prays that said judgment be in all things reversed.

Argument.

As already appears, the suit was brought against the Ohio Oil Company to recover the penalty im-

posed for the violation of Section 1 of the Act of the General Assembly of the State of Indiana approved March 4th, 1893. The plaintiff in error contends that said section of said Act as construed by the Supreme Court of the State of Indiana in sustaining the demurrer to its answer, in this suit, deprives it of its property and is therefore in violation of the Fourteenth Amendment of the Constitution of the United States. Even if it be conceded that under certain conditions the act might be upheld, it cannot be enforced against the Ohio Oil Company under the facts stated in said answer without violating said amendment of the Constitution of the United States. In the answer it is stated that the Ohio Oil Company procured a written lease for oil and gas purposes from the owner of the land described in the complaint, and by the terms thereof became the owner of all the oil and gas in and under the said land, with the exclusive right to operate for and produce the same. That it entered upon said premises under its lease with the approval of the owner of the land and commenced and completed at great expense, a well thereon for the purpose of obtaining and producing oil therefrom. That it is a corporation engaged in the business of producing oil; that oil in paying quantities was found in said well; that oil and gas are found in said premises in the same strata and that some gas escaped from the said well with the oil; that the oil produced from said well is much more valuable than the gas which escaped therefrom; that it is impossible to produce oil from said well without allowing gas to escape with it.

That the well was drilled in such a locality that no injury was or could be done to the public or an individual by the escaping gas; therefore if the plaintiff in error is compelled in accordance with the provisions of said statute to shut in the gas in

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said well and prevent it from escaping therefrom, the oil well and the oil lease of said premises will thereby be rendered valueless, and the property of the oil company therein be destroyed.

Oil and gas in place are part of the realty and belong to the owner of the land in which they are contained.

The decision of the Supreme Court of Indiana as appears by its opinion, is based upon the proposition that the owner of land has no property in the oil and gas therein until the same has been brought to the surface and confined. If this proposition is not true, then the reasons given by the Court for its decision in sustaining the demurrer to the answer, entirely fail and the conclusion reached must be held to be erroneous. It is true that Courts other than the Supreme Court of Indiana, unfamiliar with the oil and gas business, have heretofore made serious mistakes in reference to the character of these minerals, and the application of legal principles to conveyances of and operations to obtain them, but no other Court has gone so far as to hold that the owner of the land in fee is not also the owner of the oil and gas contained therein.

Pennsylvania Cases.

"A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease; but without the approval of the Orphans' Court he cannot dispose of any part of the realty. Oil is a mineral, and being a mineral, is a part of the realty, and a guardian cannot lease the land of his ward for the purpose of its developement, as it would in effect be the grant of a part of the corpus of the estate of his ward."

Appeal of Stoughton, e al., 88 P. S., 198.

Speaking of the character of the oil in the above case, the Supreme Court said:

> "Oil, however, is a mineral, and being a mineral, is part of the realty." Funk v. Haldeman, 3 P. F. Smith, (53 P. S., 229).
>
> "In this it is like coal or any other mineral product which in situ forms part of the land. It may become, by severance, personality, or there may be a right to use or take it originating in custom or prescription, as the right of a life tenant to work open mines, or to use timber for repairing buildings or fences on a farm, or for firebote. Nevertheless, when conveyance is made of it, whether that conveyance be called a lease or deed, it is, in effect, the grant of a part of the corpus of the estate and not of a mere incorporeal right. In the case above cited this is said to be so as to leases of coal lands for the purpose of mining, and there is no reason why the same should not apply to oil leases."

In the case of Gill v. Weston, 110 P. S., 312, the Supreme Court held as follows:

> "Petroleum is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands."

It became a question in this case whether a mortgage given by a lessee of certain lands for oil purposes would be a valid mortgage upon his leasehold interest under an Act of the Legislature of Pennsylvania authorizing the mortgaging of leasehold interests in mining properties.

The Court in this case, referring to the Act and the character of oil, say:

> "It matters not that the Act of 1855 was passed before petroleum was discovered. It is a mineral substance obtained from the

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> earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands. The Act in express terms makes it lawful for the lessee of a term of years of mining lands to mortgage the same."

In the opinion in the case of Brown v. Beecher, 120 P. S , 590, the Court say, on page 603:

> "The contract referred to was a lease of the lands for a specified term, and for a particular purpose, at a fixed rent or royalty reserved out of the production. As to the legal force and effect of this writing there can, we think, be no doubt. It conveyed an interest in the land; in this respect it is distinguished from a license. It is similar to the lease in Stoughton's Appeal, 88 P. S., 198, but the lease in that case was executed by a guardian, and it was held, that although a guardian might lease his ward's land from year to year in the usual form for ordinary purposes, he could not, without the decree of the Orphans' Court, bind his ward by a lease of the land for oil purposes for twenty-one years, for that was practically the sale of the oil."

In the case of Wettengell v. Gormley, 160 P. S., 559, the Court, in discussing the character of the agreement, which was an ordinary oil lease, said:

> "But this was not an agricultural lease, it was an agreement known as an oil lease; it conferred an exclusive right upon the tenant to take the oil that might underlie the whole six hundred acres, and gave him fifteen years within which to take it. It was in legal effect a sale of the oil, for the removal of which the surface and the subsurface were subject to the necessary servitudes."
>
> "An oil lease, investing the lessee with the right to remove all the oil in place in

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> the premises in consideration of his giving the lessors a certain percentum thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises."

Blakely, et al. vs. Marshall, 174 P. S., 425.

> "As was held in Stoughton's Appeal, 88 Pa., 201, and other cases in same line, oil in place is a mineral, and being a mineral it is part of the realty. An oil lease, investing the lessee with the right to remove all the oil in place, in the premises, in consideration of his giving the lessors a certain per centum thereof, is in legal effect a sale of a portion of the land and the proceeds represent the respective interests of the lessors in the premises."

(From opinion; Blakely et al. vs. Marshall, 174 P. S., 429).

In Chicago, &c. O. & M. Co. vs. U. S. Petroleum Co., 57 Pa., 83, an agreement to lease land for a term of years with exclusive right to bore for and collect oil, was held to pass a corporeal interest.

Bryan's Law of Petroleum & Nat'l Gas, page 24.

Ohio Case.

In a very recent case decided by the Supreme Court of Ohio, to be found in 57 O. St. Rep., 317, Kelly v. The Ohio Oil Company, the syllabus is as follows:

> "Petroleum oil is a mineral, and while it is in the earth, it forms a part of the realty; and when it reaches a well and is produced on the surface, it becomes personal property, and belongs to the owner of the well."

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"2. Whether such oil percolates through the rock, or exists in pools or deposits, it forms a part of that tract of real estate in which it tarries for the time being; and when it leaves one tract and enters another, it becomes a part of the realty of the latter, and thereby the owner of the former, loses all right to the oil while it remains away from his land."

New York Case.

In the case of Hughes v. United Pipe Lines, reported in 119 N. Y. C't. of Ap. Rep., 423, the syllabus is, in part, as follows:

"Oil in the earth belongs to the owner of the land and when unlawfully taken therefrom by a wrongdoer the title of such owner remains perfect and he may pursue and reclaim the property wherever he may find it."

West Virginia Cases.

"Oil in place among the strata of the earth is a part of the inheritance; an unlawful removal thereof is a disherison of him in remainder, constituting waste, which will be enjoined by a Court of equity."

Williamson v. Jones, 39 W. Va., 231.

"1. Oil—Realty.

Petroleum oil as it is found in the cavities of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word "land."

4. An oil lease, investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per cent. thereof, is, in legal effect, a sale of a portion of the land,

and the proceeds represent the respective interests of the lessors in the premises."

Wilson et al. v. Youst et al., 43 West Va., 826.

"1. The appointment of a committee of an insane person by the County Court or its clerk, without the notice required by statute, is void."

3. Oil and gas being a part of the realty in and under which they exist, the committee of an insane person having an interest therein can only sell or lease such interest by decree of Court as provided by statute."

South Penn. Oil Co. v. McIntire, et al., 44 W. Va., 296.

Cases in the United States Courts.

In Barker v. Dale, U. S. Cir. Ct. W. Dist. Pa., 3 Pitts. Law J., 190 (170), the lease was for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil, under the lessee and his heirs, &c., for 25 years in consideration of 1/2 of the oil found. Held; per McKennen, Cir. J., that by the lease the corporeal interest in the business therein described was vested in the plaintiff which as a proper subject of ejectment.

In the case of Brown v. Spilman, 155 U. S. Sup. Ct. Rep., 669/70, Mr. Justice Shiras speaking for this Court said: "Petroleum and gas are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under

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another's control, the title of the former owner is gone."

Oil and gas have been produced in the State of Pennsylvania in large quantities for nearly forty years, and the question which we are discussing is so well settled in that State that absolute grants of oil and gas in and under tracts of land are taxed separately from the surface under the provision of a statute of that State which authorizes the taxation of minerals separate from the surface.

Oil and gas in lands are there sold and transferred as land and such conveyances have been repeatedly held to be within the recording acts which relate only to conveyances of interests in real estate. It would seem therefore that if there is anything in authority, the rule is well settled that oil and gas in place are a part of the realty and belong to the owner of the land in which they are contained.

The Supreme Court of Indiana in determining this case and one or two others of a similar character, relied principally upon a statement contained in the opinion of the Supreme Court of Pennsylvania in the case of the Gas Company vs. De Witt, 130 Pa. St , 235, as follows:

> "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner."
>
> Extract from opinion, page 249.

This statement is the mere dicta of the Judge delivering the opinion of the Court and had nothing whatever to do in determining the case. The principal question with which the Supreme Court

of Pennsylvania had to deal in that case was whether the plaintiff in the suit in equity, was in possession of the gas in and under the entire tract of land. The plaintiff had obtained a lease from the owner of the land, one of the defendants, for oil and gas purposes; had drilled a well and obtained gas, and the Court held that he, by the drilling of such well upon the property, was in possession of all the gas in and under the premises and had a right to a decree restraining the owner of the land from drilling upon the portion where the terms of the lease no wells were to be drilled. It was contended by the defendants, that the lessee was not in possession of all the gas in the land covered by the lease and therefore the bill in equity should be dismissed and the plaintiff remitted to his action at law to determine his right to the gas in the portion of the tract of land upon which no wells were to be drilled. That there was no intention on the part of the Court in determining the rights of the parties in that case to hold that oil and gas are not a part of the realty, and that the owner of the land has no property in them until raised to the surface, is manifest by the decision itself, and it is also abundantly shown by the decisions of the Supreme Court of Pennsylvania rendered since that time and hereinbefore cited. We call attention especially to the cases of

Wettengell vs. Gormley, 160 Pa. St., 559.
Blakely et al. v. Marshall, 174 Pa. St., 425.

So well settled was the rule, even at the time the case of Gas Co. v. DeWitt was decided, that the judge delivering the opinion states the following proposition:

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> "They (oil and gas) belong to the owner of the land and are part of it so long as they are on or in it and are subject to his control."

If they are part of the land and belong to the owner thereof, he has an unqualified property in them.

We submit that there is not the slightest analogy between wild animals or fish in public streams, and oil and gas in place. Oil and gas are found in rocks more or less porous and so far as we know, for ages before being disturded by the drill, are stationary and as much a part of the land as the rocks in which they are contained. Animals and fish change their location of their own volition; oil and gas do not. Game and fish belong to the public; oil and gas to the owner of the land in which they are contained. The public has no interest in the oil and gas in place. It is not even alleged in the complaint in this case that the oil and gas in the land described are not part of the realty and do not belong to the defendant. That the defendant owned the oil and gas found in the gas well referred to in the complaint, is substantially admitted and for the purposes of this particular case, it is likely we have unnecessarily discussed this question There is a case however, pending in this Court which will probably be argued and disposed of in connection with this, in which the State of Indiana is plaintiff, wherein it is alleged that oil and gas are fugitive substances in which alone the public hasproperty until the same is reduced to possession by an individual or company, and it is on account of the allegations contained in that case, principally, that we have undertaken to satisfy the Court that oil and gas in place are part of the realty and belong to the owner of the surface.

If oil and gas are not part of the realty, the owner of the land is the only one who has the right to drill for and obtain them.

If this Court should be of opinion that the position of the Supreme Court of Indiana is correct, that oil and gas in place do not belong to the owner of the land in which they are contained, the decision of that Court is still erroneous and should be reversed. If the owner of the land does not own the oil and gas to be found in and under his land, until he has secured it, it is very clear that he alone has the right to enter upon the land and drill wells to the place where they are deposited. It must also be conceded that he may take through the wells which he drills on his land, all the gas and all the oil he can obtain therefrom, and the Supreme Court of Indiana concedes that when they are raised to the surface in the course of being produced through the wells, he becomes the absolute owner of them. Whether then oil and gas in place are part of the realty and belong to the owner of the land, or he has the exclusive right to drill wells on his land and produce the same, the defendant in this case, the Ohio Oil Company, according to the facts set out in its answer, was at the time this suit was instituted, engaged in a lawful business and making but a reasonable use of its own property for its benefit and profit. The plaintiff is therefore forced to the position that the State of Indiana in its sovereign capacity, has power to prevent the defendant from making such lawful and reasonable use of its property. This is unquestionably the effect of the decision of the Supreme Court of Indiana. The allegations contained in the answer are to be taken as true, and the defendant says

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that it cannot conduct its business of producing oil if it is compelled to shut in the gas which escapes with it, as the Act of 1893, under which this suit is brought, requires. It was engaged in the lawful business of producing oil from its own property and as an incident of the production of oil, the gas contained in the same rock escaped with the oil and was utilized to the extent that it aided in forcing the oil to the surface. The gas was utilized in the business of the defendant as much as it would have been by a manufacturer, if conducted to his establishment and used as fuel. Oil wells which contain little or no gas must be pumped. The defendant had no use for the gas as fuel and no means for using it as fuel, but could use it in the manner described in producing oil from its well, and as is stated in the answer, it could not use this well or any other well it should drill upon this property if it was compelled to shut in and confine the gas.

The practical working of the act of 1893 under which this suit is brought.

The practical working of the Act of 1893 under which this suit is brought, may be easily illustrated. The defendant is engaged in the business of producing oil upon the property described in the complaint, and as stated, uses the gas pressure for the purpose of raising the oil to the surface, and then the gas escapes. This course of conduct is within the prohibition of the said Act. The owner of the adjoining tract of land may be engaged in the manufacturing business and need fuel; he drills a well, obtains oil and gas; he has no difficulty in saving the oil and at the same time using the gas in his manufacturing establishment as fuel. He has not violated the said Act and reaps the full benefit of his property. That a law which

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has this effect is unjust and in violation of the Federal Constitution, we think there can be no question.

Another effect of this Act, if the contention of the plaintiff is true, can be easily presented to show the inequality and injustice inflicted upon different owners of land in the same vicinity.

The State contends that there is a large gas reservoir in Indiana where the defendant's well is located, and that a well drilled on land over and into this reservoir at that point will affect the gas over the entire area of the reservoir. In other words, that a gas well on A's land will draw into it, and there will be produced from it gas that did underlie the adjoining land of B. Assuming this position to be correct, A is engaged in the business of producing oil—he has no means of utilizing the gas except as above stated, to raise his oil to the surface. As he cannot utilize his gas he is compelled to quit business and stop producing oil and gas and close his well. B is engaged in the manufacturing business and needs fuel. He drills a well for the purpose of obtaining gas for fuel. He has no difficulty, as we have above said, in caring for his oil and at the same time conducting his gas to his manufacturing etablishment. A is compelled to quit business and B can continue the production of oil and use the gas in his manufacturing establishment until he has not only used the gas in his own land but has drawn all the gas out from under the land of A. An Act which confessedly produces such a result according to the theory of the plaintiff in reference to the gas, cannot be enforced. We do not desire to be understood however, as conceding the allegation made by the plaintiff in one of its cases against the Ohio Oil Company, pending in this Court, that gas exists in the State of Indiana in large reservoirs or a series of reservoirs and that they are well

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defined, and that gas taken from any part of them affects or reduces the common supply. This theory of the plaintiff is contrary to common knowledge. Experience in all oil and gas fields in the United States has shown that wells very near each other have shown no such effect. Very frequently within a short distance of a good gas or oil well one or more wells are drilled which produce neither oil or gas, and also within a few rods of a good oil or gas well, a smaller or a much larger oil or gas well is obtained. In some localities it is true that a well drilled on one tract of land will affect the pressue of gas in another well on an adjoining tract. It all depends upon the character of the formation in that particular locality. It is but speculation to undertake to determine the condition and situation of the formation from one to three thousand feet below the surface. If the plaintiff's theory in reference to reservoirs of gas is true, it is clear that the Act under consideration operates to the detriment of nearly every land owner within the gas belt, and is only a benefit to the gas companies engaged in transporting and supplying gas to consumers. If the gas is contained in one or more great reservoirs and a well drilled in any part will draw gas from another reservoir, then all that a gas company needs is a lease of a very few tracts of land scattered over the reservoir or reservoirs, and as the gas companies under the Act can compel all persons who drill wells on their land to shut in the gas if they are not able to utilize it in the manner done by the gas companies, they can destroy the value of the gas to every landowner except themselves until they have exhausted the gas in the entire reservoir. If our view is correct, the Act of 1893, should have been entitled "An Act for the Benefit of Gas Companies," and this action instead of being a proceeding in the interest of the citizens

of Indiana, is in the interest of companies producing and marketing gas, and detrimental to the landowners in the oil and gas belt.

If this Court is satisfied, assuming the allegations contained in the answer of the defendant to be true, that it was engaged in the reasonable use of its own property for its own benefit, and that the effect of the Act of 1893 is to prevent it from so using and operating its property, then the Act as applied to the facts in this suit, at least, is in violation of the Fourteenth Amendment of the Constitution of the United States, even though the Court should be satisfied that others may be deprived of some profit which they might make if this statute is enforced.

If the defendant's well produced gas only, a different question might be raised. The requirement of the statute that it should utilize or shut in its gas within two days after the well is completed would not interfere with the conduct of its business. If it was not in a situation or did not care to utilize the gas from the well, but should wantonly permit it to escape into the air without receiving any benefit thereby, we could understand that a different rule might possibly be held.

If the contention of the plaintiff is correct that the gas would be drawn into such well from the adjoining lands, we think that this Act cannot be sustained under any given facts which could exist, but if it could, it does not follow that the decision of the Supreme Court of Indiana in sustaining the demurrer to the defendant's answer, did not thereby deprive the defendant of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

In the case of Scott v. McNeal, 154 U. S., at page 45, this Court said:

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> "The Fourteenth Article of the Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law.' This prohibition extends to all acts of the State whether through its legislative, its executive or its judicial authorities."

In Chicago, Burlington, &c. R. R. Co. v. Chicago, 166 U. S., 226 233, Justice Harlan said:

> "It is not contended, and it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the Fourteenth Amendment, for the State Constitution not only declares that no person shall be deprived of his property without due process of law, and that private property shall not be taken or condemned for public use without just compensation. But it must be observed that the prohibitions of the Amendment refer to all instrumentalities of the State, to its legislative, executive and judicial authorities, and therefore whoever, by virtue of public position under a State government deprives another of any right protected by that Amendment against deprivation by the State, violates the Constitutional inhibition; and as he acts, in the name and for the State and is clothed with the State's power, his act is that of the State. This must be so, or as we have often said, the Constitutional Amendment has no meaning, and the State has clothed one of its agents with power to annul or evade it."

> "An Act which deprives a person of the beneficial use of his property deprives him of his property without due process of law."

In re Firmon St., 17 Wendell, 658-660.

See also in re Wall St., 17 Barb., 639-641.
Gilman v. Tucker, 128 N. Y., 190-204.
H. Ins. Co. v. N. Y., 134 U. S., 598.

Police Power.

It is claimed by the plaintiff that the Act of1893 can be sustained under the police power of the State of Indiana.

While we cannot define with absolute certainty that which is known as the "Police Power" of a State, it is well settled by the decisions of this Court and the Courts of many of the States, that it cannot invade the rights guaranteed by the Constitution of the United States. It is also well settled that a legislative declaration as to what is the proper exercise of police power, is not conclusive or binding upon the Courts. It is a judicial question. The determination of what is the proper exercise of the police power by the legislature is subject to the supervision of the Courts.

> "Powers which can only be justified on "that specific ground (that they are police "regulations), and which otherwise would be "clearly prohibited by the Constitution, can "be such only as are so clearly necessary to "the safety, comfort and well-being of "society, and so imperatively required by "the public necessity, as to lead to the "rational and satisfactory conclusion that "the framers of the Constitution could not, "as men of ordinary prudence and fore-"sight, have intended to prohibit their ex-"ercise in the particular case, notwithstand-"ing the language of the prohibition would "otherwise include it."
>
> People v. Jackson & U. P. R. Co., 9 Mich., 285.

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"Definitions of the police power must, "however, be taken subject to the condition "that the State cannot, in its exercise, for "any purpose whatever, encroach upon the "powers of the general government, or "rights granted or secured by the Supreme "law of the land."

N. O. Gas Co. v. Louisiana L. Co., 115 U. S. S. C. Rep., 661.

"The police power of the State to regu- "late the sale of intoxicating liquors and "preserve the public health and morals "does not warrant the enactment of laws "infringing positive provisions of the Con- "stitution of the United States."

Walling v. Mich., 116 U. S. S. C. Rep., 447.

In the course of the opinion in this last case the Court say, on page 460:

"The police power cannot be set up to "control the inhibitions of the Federal Con- "stitution, or the powers of the United States "Government created thereby."

In Mugler v. Kansas, 123 U. S., 661, Harlan, J., says:

"Undoubtedly the State, when providing "by legislation for the protection of the "public health, the public morals or the "public safety, is subject to the paramount "authority of the Constitution of the United "States, and may not violate rights secured "by that instrument."

"While generally it is for the Legislature "to determine what laws are required to "protect and secure the public health, com- "fort and safety, under the guise of police "regulations it may arbitrarily infringe upon "personal property rights; and its determi- "nation as to what is a proper exercise of the

"power is not final or conclusive, but is "subject to the scrutiny of the Courts."

"When, therefore, the Legislature passes "an act ostensibly for the public health, but "which does not relate to, and is inappro- "priate for the purpose, and which destroys "the property or interferes with the rights "of the citizens, it is within the province "of the Courts to determine this fact and "to declare the act violative of the consti- "tutional guaranties of those rights."

In the course of the opinion the Court say:

"What does this act attempt to do? In "form it makes it a crime for a cigarmaker "in New York and Brooklyn, the only "cities in the State having a population ex- "ceeding 500,000, to carry on a perfectly "lawful trade in his own home. Whether "he owns the tenement house or has hired "a room therein for the purpose of prosecut- "ing his trade, he cannot manufacture "therein his own tobacco into cigars for his "own use or sale, and he will become a "criminal for doing that which is perfectly "lawful outside of the two cities named— "everywhere else, so far as we are able to "learn, in the whole world. He must either "abandon the trade by which he earns a "livelihood for himself and family, or, if "able, procure a room elsewhere, or hire "himself out to to one who has a room upon "such terms as, under the fierce competition "of trade and the inexorable laws of supply "and demand, he may be able to obtain "from his employer. He may choose to do "his work where he can have the super- "vision of his family and their help, and "such choice is denied him. He may choose "to work for himself rather than for a task- "master, and he is left without freedom of "choice. He may desire the advantage of "cheap production in consequence of his "cheap rent and family help, and of this

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"he is deprived. In the unceasing strug-
"gle for success and existence which pervades
"all societies of men, he may be deprived
"of that which will enable him to maintain
"his hold and to survive. He may go to a
"tenement house, and, finding no one liv-
"ing, sleeping, cooking or doing any house-
"hold work upon one of the floors, hire a
"room upon such floor to carry on his trade,
"and afterwards some one may commence to
"sleep or to do some household work upon
"such floor, even without his knowledge,
"and he at once becomes a criminal in con-
"sequence of another's act. He may go to
"a tenement house and finding but two fam-
"ilies living therein independently, hire
"a room, and afterwards by subdivision of the
"families, or a change in their mode of life,
"or in some other way, a fourth family be-
"gins to live therein independently, and
"thus he may become a criminal without
"the knowledge or possibly the means of
"knowledge that he has violated any law.
"It is, therefore, plain that this law inter-
"feres with the profitable and free use of his
"property, by the owner or lessee of a tene-
"ment house who is a cigar maker, and
"trammels him in the application of his
"industry and the disposition of his labor,
"and thus, in a strictly legitimate sense, it
"arbitrarily deprives him of his property and
"of some portion of his personal liberty.

"The constitutional guarantee that no
"person shall be deprived of his property
"without due process of law may be vio-
"lated without the physical taking of
"property for public or private use. Prop-
"erty may be destroyed or its value may be
"annihilated; it is owned and kept for some
"useful purpose, and it has no value unless
"it can be used. Its capacity for enjoy-
"ment and adaptability to some use are
"essential characteristics and attributes
"without which property cannot be con-

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> "ceived; and hence any law which destroys "it or its value, or takes away any of its "essential attributes, deprives the owner of "his property."

In People v. Gilson, 109 N. Y., 389-400, Mr. Justice Peckham, says:

> "This brings us to the consideration of "the question whether that act is valid as "a proper exercise of what is, by way of "classification, called the police power of the "State. That power has never yet been "fully described nor its extent plainly lim-"ited, further, at least, than this, it is not "above the Constitution, but it is bounded "by its provisions; and if any liberty or "franchise is expressly protected by any "constitutional provision, it cannot be de-"stroyed by any valid exercise by the Leg-"islature of the police power. The extent "of this power has been the subject of dis-"cussion in this Court, and in the recent "and most important case of *In re* Jacobs "(98 N. Y., 107) the question was examined "and most exhaustively reviewed by Earl, "J., in his opinion. To reopen the subject "would now be useless, and I refer to that "case as authority for the statement that the "Legislature cannot, without reason and "arbitrarily, infringe upon the liberty or "the property rights of any person within "the protection of the Constitution of this "State; and that if the Legislature shall "determine what is proper exercise of its "police power, its decision is subject to the "scrutiny of the Courts."

In Colon v. Lisk, 153 N. Y., 188, the Court of Appeals of New York has recently restated the general rule laid down by the foregoing authorities.

See also:

People v. Marx, 99 N. Y., 377-387.
People v. Arensberg, 103 N. Y., 399.
Foster v. Scott, 136 N. Y., 577-584.

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Whenever the Legislature passes on an act which transcends the limit of the police power, it is the duty of the judiciary to pronounce it invalid and nullify the attempt to invade the people's rights.

Nechamous v. Warden, 144 N. Y., 529-535.

See also:

Health Dept v. Rector, 145 N. Y., 32-39.

"The reasonable enjoyment of one's real "estate is certainly a vested right, which "cannot be interfered with or limited arbi-"trarily. The constitutional guaranty of pro-"tection for all private property extends "equally to the enjoyment and the posses-"sion of lands."

Tideman, Lim. of Police Powers, Sec. 122, page 423.

"In order to lay the foundation of a "claim for compensation for the taking of "property in the exercise of the right of "eminent domain, it is not necessary that "there should be an actual or physical tak-"ing of the land. Whenever the use of the "land is restricted in any way, or some in-"corporeal hereditament is taken away, "which was appurtenant thereto, it consti-"tuted as much a taking as if the land it-"self had been appropriated."

Tideman's Lim. of Police Powers, Sec. 121d, page 397.

Under the guise of police power the Legislature cannot invade the rights of persons and property and a statute, the ostensible object of which is to secure the public welfare or safety, must appear to be adapted to that end.

Rickey v. People, 155 Ill., 98.
People v. Gilson, 109 N. Y., 389.

Calder v. Bull, 3 Dall., 386; 109 Mass., 315.
Cooley's Con. Lim. 6th Ed., 306, 307, 309.

Under the foregoing authorities it is clear to us that this Court should not hold that the Act of 1893 in its effect upon conditions such as appear in this suit, is a proper exercise of the police power. It has the effect of destroying one man's property for the benefit of another and to prevent the owner of land in which oil and gas are contained from operating it for his own benefit in a reasonable and prudent manner. If we are correct in our proposition in reference to the character of oil and gas they belong to the owner of the land in which they are found, and the public has no interest in a proper sense, in the manner in which they shall be used or disposed of by the owner thereof, the simple question of private rights is involved.

Neither the state nor the public can appropriate one ounce of the gas underlying the land in Indiana, and for that, if for no other reason the Legislature of the State cannot enact a law that will operate to allow one landowner to utilize the oil and gas and prevent his neighbor from doing either.

STEPHENSON, SHIRTS & FERTIG,
M. F. ELLIOTT,
Attys. for Plaintiff in Error.

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No. 309. 84

Brief of Elliott for P. C.

Court U. S.
MAR 8 1899
Clerk.

Filed Mar. 8, 1899.

Supreme Court of the United States.

October Term, 1898, No. 309.

THE OHIO OIL COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA,

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

ARGUMENT FOR PLAINTIFF IN ERROR.

STEPHENSON, SHIRTS & FERTIG,
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APPEAL PRINTING CO., 14 Vesey Street, N. Y.

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Supreme Court of the United States.

THE OHIO OIL COMPANY, Plaintiff in Error,	October Term, 1898.
vs.	No. 309.
THE STATE OF INDIANA, Defendant in Error.	

In Error to the Supreme Court of the State of Indiana.

BRIEF FOR THE PLAINTIFF IN ERROR.

Abstract.

On the 12th day of March, 1898, the State of Indiana in its sovereign capacity commenced this action in the Circuit Court of Madison County, Indiana, to enjoin the plaintiff in error from an alleged waste of natural gas by it averred to have been committed.

The complaint proceeds upon the theory that under the provisions of the Act of the Legislature of Indiana, approved March 4th, 1893, that the use of its property by the plaintiff in error as charged in the complaint was unlawful.

See Record, pages 1 to 7.

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The complaint in the present case was an amended complaint, a demurrer having been sustained in said Circuit Court to the original complaint which upon an appeal to the Supreme Court of Indiana was held to be a good complaint.

See opinion printed in the Record in this action commencing on page 15.

After the cause had been reversed in the Supreme Court of Indiana and after the ruling that the original complaint was sufficient upon demurrer, and after the amended complaint above to referred had been filed in said Circuit Court, the demurrer to the complaint filed by the plaintiff in error was overruled.

See Record, page 8.

Thereupon the plaintiff in error filed its answer to said amended complaint. This answer set out in full the statute of the State of Indiana so passed and approved on the 4th day of March, 1893. It further alleged in substance that the plaintiff in error was engaged in the production of oil in said State and that it was not engaged in the business of producing or transporting natural gas; that it had in its service only employees of the highest skill, and that the machinery, devices and process used by it in the production of oil were the most approved known to the world; that the wells in question were drilled in the country remote from any dwelling and were not, in fact, a nuisance; that the oil which was produced from said wells was of more value than the gas that was suffered to escape; it admitted that it suffered some gas to escape but alleged that no more was suffered to escape in the operation of said wells than was consistent with the due

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operation of said wells as oil wells with the highest skill.

It was further alleged that it was impossible to produce oil in such cases without allowing the natural gas that might be found therein to escape and that in the raising of such oil in such wells it used the natural gas found therein as a force, power and agency to raise the oil therein to the surface in order to utilize the same, such being the ordinary and usual way of raising and saving oil in such cases.

It was further alleged in said answer that the said act of the Legislature of Indiana forbidding the production of oil in such case by reason of the escape of natural gas was in violation of the Fourteenth Amendment to the Constitution of the United States for the reason that the same was an unjust discrimination in favor of gas companies and against those engaged in the production of oil and that the construction given thereto by the Supreme Court of Indiana amounted to a confiscation of the property of the plaintiff in error without any compensation.

See Record, page 8 to page 12.

To this answer the defendant in error filed a demurrer, which demurrer was by said Circuit Court sustained, and the plaintiff in error refusing to plead further, final judgment was rendered in the Circuit Court adjoining the plaintiff in error from the use of said walls.

See Record, pages 12 and 13.

Upon such final judgment the plaintiff in error appealed to the Supreme Court of Indiana and in said last named Court it was held and decided that the questions presented by the Record were fully considered and decided against the plaintiff

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in error in the case of *The State of Indiana vs. The Ohio Oil Company, 49 N. E. Reporter, 109*, the same being the opinion set forth in the Record as above herein referred to. And upon the authority of that case the present case was decided adversely to the plaintiff in error in the Supreme Court of Indiana.

See Record, page 15.

From this decision of the Supreme Court of Indiana the plaintiff in error prayed a writ of error and the same was granted by the Chief Justice of the Supreme Court of Indiana, the Honorable Timothy E. Howard, on the 28th day of April, 1898.

See Record, page 36.

And thereafter citations were duly issued and acknowledgment of service had and bond executed duly approved by the Chief Justice of said Supreme Court of Indiana.

See Record, pages 37 and 38.

The errors assigned in this Court are found in the Record on page 39:

1. The Circuit Court erred in overruling the demurrer to the amended complaint.

2. The Circuit Court erred in sustaining the demurrer to the answer.

3. The Supreme Court of Indiana erred in holding that the complaint was sufficient.

4. The Supreme Court of Indiana erred in holding that the answer was insufficient.

5. The Supreme Court of Indiana erred in holding that the said act of March 4, 1893, was not in violation of the 14th amendment to the Constitu-

tion of the United States, and erred in holding that such act of the Legislature of Indiana did not operate to deprive the plaintiff in error of liberty and property without due process of law.

Argument.

The bill of complaint in this suit alleges among other things that the plaintiff in error was unlawfully wasting natural gas. The answer alleges and the demurrer thereto admits the fact to be, that the suit is prosecuted under the act of the General Assembly of Indiana above mentioned, and which act is set out in full in the answer. The question, therefore, is presented whether the said act of the General Assembly of Indiana as construed by the Supreme Court of that State is in violation of the 14th amendment to the Constitution of the United States. It must be admitted under the pleadings, decree and judgment of the Supreme Court of Indiana in this suit, that said statute and the construction thereof by said Supreme Court deprives the plaintiff in error of all right to produce and save oil in its wells within said State. Is such a statute valid either as an exerciser of the police power of the State or as a regulation of the business of producing oil? It is assumed by the State in this cause that it has the right in its sovereign capacity, to regulate and restrict the tapping, by owners of the land, of what it calls the lake or series of lakes of natural gas underlying a number of counties within the State of Indiana. If this assumption was true, we deny the right of the State of Indiana to prohibit the owners of lands under which it is claimed these subterranean lakes of gas are situated from drilling wells for oil on their own land,

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into the strata in which the gas is found, for the purpose of obtaining and utilizing oil and other minerals, even though by their so doing quantities of gas would escape through the wells so drilled into the open air. We, however, deny the assumption on the part of the State that there exists anywhere in Indiana what can with any propriety be called a lake of natural gas. This allegation is so completely in opposition to common knowledge upon the subject that it ought not to have any weight with this Court. No one can define, with any degree of accuracy, at what place or places within the gas belt of Indiana, the oil and gas can be found by drilling for it, nor has it ever been demonstrated that the drilling of a well in one locality will have any effect upon the quantity of gas in another. It is not infrequent that within a short distance of a good gas or oil well, wells are drilled which produce neither oil nor gas.

It has been settled by the great weight of authority that oil and gas in place are a part of the realty, and the owner of the land has the same title thereto as to any other portion of the same. Upon this question we cite the following cases:

In the case of Stoughton's Appeal, 88 Pa. St., 198, the Supreme Court of Pennsylvania said:

> "A guardian has ordinarily power to lease "any of his ward's property of such char- "acter as makes it the subject of a lease; "but without the approval of the Orphans' "Court he cannot dispose of any part of the "realty. Oil is a mineral, and being a min- "eral, is part of the realty, and a guardian "cannot lease the land of his ward for the pur-

"pose of its development, as it would, in effect, "be the grant of a part of the corpus of the "estate of his ward."

In speaking of the character of oil the Court said:

"In this it is like coal or any other mineral "product which, *in situ*, forms part of the "land. It may become, by severance, per- "sonalty, or there may be a right to use or "take it originating in custom or prescription, "as the right of a life tenant to work open mines, "or to use timber for repairing buildings or "fences on a farm, or for firebote. Nevertheless, "whenever conveyance is made of it, whether "that conveyance be called a lease or deed, it "is, in effect, the grant of a part of the *corpus* "of the estate and not of a mere incorporeal "right. In the case above cited this is said "to be so as to leases of coal lands for the pur- "pose of mining, and there is no reason why "the same doctrine should not apply to oil "leases."

And in the case of Gill v. Watson, 110 Pa. St., 312, the Court also said:

"Petroleum is a mineral substance obtained "from the earth by a process of mining, and "lands from which it is obtained may with "propriety be called mining lands."

And in Wettengell v. Gormley, 160 Pa. St., 559, the Court, in discussing the character of the agreement which was an ordinary oil lease, said:

"But this was not an agricultural lease, it "was an agreement known as an oil lease; it "conferred an exclusive right upon the tenant "to take the oil that might underlie the "whole six hundred acres, and gave him fif- "teen years within which to take it. It was "in legal effect a sale of the oil, for the re-

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"moval of which the surface and the sub-sur-
"face were subject to the necessary servi-
"tudes."

And in Brown v. Beecher, 120 Pa. St., 590, the Court said, on page 603.

"The contract referred to was a lease of the
"lands for a specified term, and for a particu-
"lar purpose, at a fixed rent or royalty re-
"served out of the production. As to the legal
"force and effect of this writing there can, we
"think, be no doubt. It conveyed an interest
"in the land; in this respect it is distinguished
"from a license. It is similar to the lease in
"Stoughton's Appeal, 88 P. S., 198, but the
"lease in that case was executed by a guar-
"dian, and it was held, that although a guar-
"dian might lease his ward's land from year to
"year in the usual form for ordinary pur-
"poses, he could not, without the decree of
"the Orphans' Court, bind his ward by a
"lease of the land for oil purposes for twenty-
"one years, for that was practically the sale
"of the oil."

And in Wilson v. Youst, 43 West Virginia, 826, the Court said:

"Petroleum oil, as it is found in the cavity
"of the rock is part of the realty and is im-
"braced in the idea which attaches to the
"word land."

In Ohio the ruling has been the same. In the case of Kelly v. The Ohio Oil Company, 39 L. R. A., 765, the syllabus in part is as follows:

"Petroleum is a mineral, and while it is in
"the earth it forms a part of the realty; and
"when it reaches a well, and is produced on
"the surface, it becomes personal property
"and belongs to the owner of the well."

In New York the same doctrine prevails. In the case of Hughes v. United Pipe Lines, 119 N. Y., the syllabus is in part as follows:

> "Oil in the earth belongs to the owner of "the land and when unlawfully taken there- "from by a wrongdoer the title of such owner "remains perfect and he may pursue and re- "claim the property wherever he may find "it."

In West Virginia the ruling is also the same. In the case of Williamson v. Jones, 39 W. Va., 231, it is held.

> "Oil in place among the strata of the earth "is a part of the inheritance; an unlawful re- "moval thereof is a disherison of him in re- "mainder, constituting waste, which will be "enjoined by a Court of equity."

These authorities show, therefore, that the plaintiff in error, in the operation of the land in question, was the owner both of the oil and gas found beneath the surface. And they also clearly show that such oil and gas is the subject of distinct ownership. It is alleged in the answer and admitted by the demurrer that it is impossible to produce oil without allowing the gas found in the well to escape. The question of malice is disposed of in this action by the averment which is also admitted, that the operations of the plaintiff in error were conducted in entire good faith, with the highest skill and with the best appliances known to the world. Whatever of injury, therefore, that might happen to an owner of other lands, whether joining or remote, must be regarded as incidental and a necessary consequence for which no action either for damages or injunction would lie. If this be a correct statement of the law and if it be true as the answer avers, that it is

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impossible to produce the oil without some escaping of gas, is the Indiana statute an invasion of the federal constitution as taking away the property of the plaintiff in error without compensation, to wit, for forbidding not only the taking of the oil, but also forbidding the use of the gas for the purpose of raising and serving the oil?

2. The Police Power.

If the Legislatdre of Indiana had the right to enact the statute of 1893; if, as we have said before, it is to be construed strictly, it is because it is within what is known as the police power of the State.

It is very difficult to define or limit what is known as the police power of the State.

The proposition is a correct one, however, that it cannot invade a right guaranteed by the Constitution.

This statute applied to the facts and conditions set forth in the answer, we think we have demonstrated, most clearly invades the constitutional right by depriving the owner of his property without due process of law.

The question is a judicial one, and must be determined by this Court.

> "Powers which can only be justified on that "specific ground (that they are police regula- "tions), and which otherwise would be clearly "prohibited by the Constitution, can be such "only as are so clearly necessary to the safety, "comfort and well-being of society, and so "imperatively required by the public neces- "sity, as to lead to the rational and satisfac- "tory conclusion that the framers of the Con- "stitution could not, as men of ordinary pru- "dence and foresight, have intended to pro-

"hibit their exercise in the particular case, "notwithstanding the language of the prohibi- "tion would otherwise include it."

People v. Jackson & U. P. R. Co., 9 Mich., 285.

"Definitions of the police power must, how- "ever, be taken, subject to the condition that "the State cannot, in its exercise, for any pur- "pose whatever, encroach upon the powers of "the general government, or rights granted or "secured by the supreme law of the land."

N. O. Gas Co. v. Louisiana L. Co., 115 U. S. S. C. Rep., 661.

"The police power of a State to regulate the "sale of intoxicating liquors and preserve the "public health and morals does not warrant "the enactment of laws infringing positive "provisions of the Constitution of the United "States."

Walling v. Mich., 116 U. S. S. C. Rep., 447.

I the course of the opinion in this last case the Court say, on page 460:

"The police power cannot be set up to con- "trol the inhibitions of the Federal Constitu- "tion or the power of the United States Gov- "ernment created thereby."

In Mugler v. Kansas, 123 U. S., 661, Harlan, J., says:

"Undoubtedly the State, when providing "by legislation for the protection of the pub- "lic health, the public morals or the public "safety, is subject to the paramount authority "of the Constitution of the United States, and "may not violate rights secured by that in- "strument."

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"While generally it is for the Legislature "to determine what laws are required to pro- "tect and secure the public health, comfort "and safety, under the guise of police regu- "lations, it may not arbitrarily infringe upon "personal property rights; and its determina- "tion as to what is a proper exercise of the "power is not final or conclusive, but is sub- "ject to the scrutiny of the Courts."

"When, therefore, the Legislature passes an "act ostensibly for the public health, but "which does not relate to, and is inappropriate "for the purpose, and which destroys the "property or interferes with the rights of the "citizens, it is within the province of the "Courts to determine this fact and to declare "the act violative of the constitutional guar- "anties of those rights."

In the course of the opinion the Court say:

"What does this act attempt to do? In "form it makes it a crime for a cigarmaker in "New York and Brooklyn, the only cities in "the State having a population exceeding "500,000, to carry on a perfectly lawful trade "in his home. Whether he owns the tene- "ment house or has hired a room therein for "the purpose of prosecuting his trade, he can- "not manufacture therein his own tobacco into "cigars for his own use or for sale, and he will "become a criminal for doing that which is "perfectly lawful outside of the two cities "named—everywhere else, so far as we are "able to learn, in the whole world. He must "either abandon the trade by which he "earns a livelihood for himself and family, "or, if able, procure a room elsewhere, or "hire himself out to one who has a room upon "such terms as, under the fierce competition "of trade and the inexorable laws of supply "and demand, he may be able to obtain from "his employer. He may choose to do his work "where he can have the supervision of his

"family and their help, and such choice is de-
"nied him. He may choose to work for him-
"self rather than for a taskmaster, and he is
"left without freedom of choice. He may de-
"sire the advantage of cheap production in
"consequence of his cheap rent and family
"help, and of this he is deprived. In the un-
"ceasing struggle for success and existence
"which pervades all societies of men, he may
"be deprived of that which will enable him
"to maintain his hold and to survive. He
"may go to a tenement house, and, finding no
"one living, sleeping, cooking or doing any
"household work upon one of the floors, hire
"a room upon such floor to carry on his trade,
"and afterwards some one may commence to
"sleep or do some household work on such
"floor, even without his knowledge, and he at
"once becomes a criminal in consequence of
"another's act. He may go to a tenement house
"and finding but two families living therein
"independently, hire a room, and afterwards
"by subdivision of the families, or a change in
"their mode of life, or in some other way, a
"fourth family begins to live there-
"in independently, and thus he
"may become a criminal without the knowl-
"edge or possibly the means of knowledge
"that he was violating any law. It is, there-
"fore, plain that this law interferes with the
"profitable and free use of his property, by
"the owner or lessee of a tenement house who
"is a cigar maker, and trammels him in the
"application of his industry and the disposi-
"tion of his labor, and thus, in a strictly legit-
"imate sense, it arbitrarily deprives him of
"his property and of some portion of his per-
"sonal liberty.

"The constitutional guarantee that no per-
"son shall be deprived of his property without
"due process of law may be violated without
"the physical taking of property for public or
"private use. Property may be destroyed or
"its value may be annihilated; it is owned
"and kept for some useful purpose and it has

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"no value unless it can be used. Its capacity "for enjoyment and adaptability to some use "are essential characteristics and attributes "without which property cannot be con- "ceived; and hence any law which destroys "it or its value, or takes away any of its es- "sential attributes, deprives the owner of his "property."

In People v. Gilson, 109 N. Y., 389-400, Mr. Justice Peckham says:

"This brings us to the consideration of the "question whether that act is valid as a prop- "er exercise of what is, by way of classifica- "tion, called the police power of the State. "That power has never yet been fully "described nor its extent plainly limit- "ed, further, at least, than this, it is "not above the Constitution, but it is bound- "ed by its provisions; and if any liberty or "franchise is expressly protected by any con- "stitutional provision, it cannot be destroyed "by any valid exercise by the Legislature of "the police power. The extent of this power "has been the subject of discussion in this "Court, and in the recent and most important "case of *In re* Jacobs (98 N. Y., 107) the "question was examined and most exhaus- "tively reviewed by Earl, J., in his opinion. "To reopen the subject now would be useless, "and I refer to that case as authority for the "statement that the Legislature cannot, with- "out reason and arbitrarily, infringe upon the "liberty or the property rights of any person "within the protection of the Constitution of "this State; and that if the Legislature shall "determine what is proper exercise of its po- "lice power, its decision is subject to the "scrutiny of the Courts."

In Colon v. Lisk, 153 N. Y., 188, the Court of Appeals of New York has recently restated the general rule laid down by the foregoing authorities. See also:

People v. Marx, 99 N. Y., 377-387.
People v. Arensberg, 103 N. Y., 399.
Foster v. Scott, 136 N. Y., 577-584.

Whenever the Legislature passes on an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid and nullify the attempt to invade the people's rights.

Nechamous v. Warden, 144 N. Y., 529-535.

See also:

Health Dept. v. Rector, 145 N. Y., 32-39.

An act which deprives a person of a beneficial use of his property deprives him of his property without the due process of law.

In re Firmin St., 17 Wend., 658-660.
In re Wall St., 17 Barb., 639-641.
Gilman v. Tucker, 128 N. Y., 190-204.
H. Ins. Co. v. N. Y., 134 U. S., 598.

In the case of G. C. & S. F. Ry. Co. vs. Ellis, 165 U. S. S. C. Rep., 150, the syllabus is as follows:

"The act of the Legislature of Texas of "April 5, 1889, which provides that any per-"son in this State having a valid *bona fide* "claim for personal services rendered or labor "done, or for damage, or for overcharges on "freight, or claims for stock killed or injured "by the train of any railway company: Pro-"vided, That such claim for stock killed or "injured shall be presented to the agent of the "company nearest to the point where such "stock was killed or injured, against any rail-"way corporation operating a railroad in this "State, and, if the amount of such claim does

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"not exceed $50., may present the same, ver-
"ified by his affidavit, for payment to such
"corporation by filing it with any station agent
"of such corporation in any county where suit
"may be instituted for the same, and if, at the
"expiration of thirty days after such presen-
"tation such claim has not been paid or sat-
"isfied he may immediately institute suit
"thereon in the proper Court; and if he shall
"finally establish his claim, and obtain judg-
"ment for the full amount thereof, as pre-
"sented for payment to such corporation in
"such Court, or any Court to which the suit
"may have been appealed, he shall be entitled
"to recover the amount of such claim and all
"costs of suit, and in addition thereto all
"reasonable attorneys' fees, provided he has
"an attorney employed in his case, not to ex-
"ceed $10., to be assessed and awarded by the
"Court or jury trying the issue, operates to
"deprive the railroad companies of property
"without due process of law, and denies to
"them the equal protection of the law, in that
"its singles them out of all citizens and cor-
"porations, and requires them to pay in cer-
"tain cases attorney's fees to the parties suc-
"cessfully suing them, while it gives to them
"no like or corresponding benefit."

"The mere fact of classification is not suf-
"ficient to relieve a statute from the reach of
"the equality clause of the Fourteenth Amend-
"ment, and in all cases it must appear not
"merely that a classification has been made,
"but also that it is based upon some reason-
"able ground—something which bears a just
"and proper relation to the attempted classi-
"fication, and is not a mere arbitrary selec-
"tion. Tested by these principles, the statute
"in controversy cannot be sustained."

In the course of the opinion on page 154, the Court say:

"It is well settled that corporations are per-
"sons within the provisions of the Fourteenth

"Amendment of the Constitution of the Unit-
"ed States."

"The reasonable enjoyment of one's real
"estate is certainly a vested right, which can-
"not be interfered with or limited arbitrarily.
"The constitutional guaranty of protection for
"all private property extends equally to the
"enjoyment and the possession of lands."

Tideman, Lim. of Police Powers, Sec. 122, page 423.

"In order to lay the foundation of a claim
"for compensation for the taking of property
"in the exercise of the right of eminent do-
"main, it is not necessary that there should
"be an actual or physical taking of the land.
"Whenever the use of the land is restricted
"in any way, or some incorporeal heredita-
"ment is taken away, which was appurtenant
"thereto, it constituted as much a taking as
'if the land itself had been appropriated."

Tiedeman's Lim. of Police Powers, Sec. 121d, page 397.

Under the guise of police power the Legislature cannot invade the rights of persons and property and a statute, the ostensible object of which is to secure the public welfare or safety, must appear to be adapted to that end.

Richey vs. People, 155 Ill., 98.
People vs. Gilson, 109 N. Y., 389.
Calder vs. Bull, 3 Dall., 386; 109 Mass., 315.
Cooley's Con. Lim. 6th Ed., 306, 307, 309.

In Jameison vs. Indiana Natural Gas and Oil Company, 136 Ind., 563, Judge Elliott said:

"The question as it comes to us is not a
'broad one, involving the authority of the Leg-
"islature arbitrarily to enact a law destruc-

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"tive of property or commercial rights under "the guise of exercising police powers, for "here there is regulation and not destruction."

And in this argument in the Flambeaux case Mr. Shirley, on page 20 of his brief, in contending for the constitutionality of that law, says:

"The natural gas statute does not inhibit "the beneficial use by the owner, but only one "particular use, the abuse of which was an evil "threatening, when the statute was passed to "demoralize and ultimately to destroy a great, "if not the staple product of the State. Nor "can it be insisted that the act in question at- "tempted or was intended to confiscate or "seize or forfeit any private right in property."

The Flambeaux statute did not in terms prohibt the burning of natural gas. It allowed the owner to use gas by burning it in certain described burners, and, therefore, the argument may have been said to be pertinent for the reason that the owner was allowed some use.

But in the case in hand, the act of the Legislature, if construed as the State demands, does amount to confiscation, because, under the averments of the answer, which must be taken as true, for the purpose of this case, it is impossible to raise oil without, at the same time, some gas escapes, and, therefore, it is strictly accurate to say that the legislation in question is not regulation, but is confiscation as applied to oil. But even if this legislation is supposed to be a regulation, such regulation must be reasonable and fair and must not amount to confiscation, because, under the doctrine of the cases cited above from the Supreme Court of the United States, property cannot be confiscated, even under the exercise of the police power.

See also:

Health Dept. vs. Trinity Church, 145 N. Y., 32.
Millett vs. People, 117 Ill., 294.

And so, in Davis vs. State, 68 Ala., 58, where a statute made it unlawful to transport cotton in the seed after sunset and before sunrise, the Court said that the prohibition was confined to cotton in the seed, and did not inhibit all transportation, to wit, only at night, while in the case at hand, under the averments of the answer, the legislation in question prohibits the production of oil.

In the case of *In re* Grice, 79 Fed. Rep., p. 627, where the Legislature of Texas passed an anti-trust law that applied to all contracts relating to competition, the Federal Court held the law unconstitutional because not limited to the particular contracts sought to be suppressed; in other words, that the statute was so broad and sweeping that to enforce it according to its terms would be to prevent all innocent enjoyment of owners of property rights. So in the case at bar, the answer alleges that this particular oil well is situate remote from any town or village, and in the country, and that it is operated with the highest skill known to the world, and that in such operation there is no danger to life and property. This averment is by the demurrer admitted, therefore, as applied to such an innocent enjoyment of one's own property, if the statute is to be construed as the State insists, it is so broad and sweeping as to take away property rights without compensation, so as to be an unjust and unreasonable exercise of the alleged police power of the State.

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3. Is the Indiana Statute reasonable?

It was held by Mr. Justice Brown of this Court in the case of Holden vs. Hardy, decided in April, 1898:

> "The question in each case is whether the "Legislature has adopted the statute in ex- "ercise of a reasonable discretion, or whether "its action be a mere excuse for an unjust "discrimination, or the oppression or spolia- "tion of a particular class."

On this subject compare the views of the Supreme Court of the United States in the following cases:

> Barbier vs. Connolly, 113 U. S., 27.
> Soon Hing vs. Crowley, 113 U. S., 703.
> Yick Wo vs. Hopkins, 118 U. S., 356.

In the case at bar it is confessed by the State by its pleadings and argument that the purpose of the Indiana statute was either to postpone all the oil interests of Indiana or entirely to suppress them, and all this to the advantage, interest and profit of those engaged either in producing or consuming natural gas. The business of producing oil within said State being a lawful one, it is submitted that any legislation by the State which either in terms or by the practical operation of the statute results in suppressing the business of the plaintiff in error, is obnoxious to the constitution. It is not competent for the Legislature of Indiana nor that of any other State in the Union to distinguish between two great industries and say that the one may develop and the other be suppessed.

Stratton vs. Morris, 89 Tenn., 497.

In another Tennessee case it was said:

> "Every partial or private law which directly proposes to destroy or affect individual "rights or does the same thing by affording "remedies leading to similar consequences is "unconstitutional and void."
>
> Van Zant vs. Waddel, 2d Yerg., 260.
> See also Eden vs. People, 160 Ills., 296.

These authorities were cited with express approval by Justice Brewer in Gulf vs. Ellis, 165 U. S., 150.

The great reliance of the State in this Court rests upon the case of Townsend vs. State, 147 Ind., 624. That decision was upon what is commonly called the flambeaux act, the same being Section 2316, Burn's Statutes, 1894. (Acts 1891, page 55.) That statute prohibited the burning of natural gas in flambeaux lights, but expressly provided that such gas might be used and burned in burners enclosed in glass globes. It was said, however, in the opinion in that case, on page 628:

> "But the act in no way deprives the owner " of the full and free use of his property. It "restrains him from wasting gas to the injury "of others, to the injury of the public."

And so in another Indiana case the Court said:

> "The question as it comes to us is not a "broad one, involving the authority of the "Legislature arbitrarily to enact a law de"structive of property or commercial rights "under the guise of exercising police powers, "for here there is regulation and not destruc"tion."
>
> Jameison vs. Indiana Natural Gas and Oil Co., 136 Ind., 563.

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For the first time in the history of the State of Indiana the Legislature has attempted in the act under consideration to foster one industry at the expense and destruction of another, each of which industries are in themselves valid and lawful. The theory of the bill is that the exhaustion of gas is certain; but the State contends that the persons who are engaged in the production of natural gas shall be allowed to exhaust it to the exclusion of persons engaged in the other business, wherein natural gas is allowed to escape incidentally to the carrying on of such business. What right does a manufacturer or a gas company have to insist that the owner of land shall not be allowed to produce whatever is contained in it, so long as he does it in the reasonable and ordinary way. As we have above shown, the plaintiff in error was proceeding in good faith, with the highest skill and with appliances the best known to the world in the production of its business, upon its own land. It was producing a commodity, according to the language of its answer, which, when raised to the surface was of greater value than the gas it allowed to escape. This it must be remembered also was being done in the country, remote from any village or dwelling and where the same could not as matter of fact become a nuisance to any one. The only result of this operation according to the language of the bill, is that in raising and saving the oil so owned by the plaintiff in error, that it detracted from and diminished the volume of natural gas in the so-called reservoir under the various counties in Indiana. If it be true that such diminution results, in what respect does it differ from the diminution of the water supply from subterranean springs as shown in the authorities above herein cited?

Again, when we say that a statute must be rea-

sonable we must look to both sides of the question. It must not be one-sided. The contention of the State is that it must have all the gas not merely from under the land that its citizens own, but that it must likewise have all the gas drawn from under the land of the plaintiff in error, thereby depriving it not only of the oil, but the gas also. Besides this, it is alleged in the answer that the plaintiff in error uses the gas which escapes from its wells for the purpose of raising the oil in the wells. In other words, instead of purchasing machinery for the purpose of raising such oil, it uses the machinery which nature has provided.

See also

Smoke Nuisance cases.
City of St. Louis vs. Heitziberg Co., 42 S. W., 954.
Harmon vs. Chicago, 110 Ill., 400.
City of St. Paul vs. Gilfillan, 36 Minn., 298.

4. Does the plaintiff in error waste gas.

Among the definitions given by Webster of waste is "unnecessary destruction." It must be in this sense, if at all, that the State can contend that the plaintiff in error is wasting gas. But the plaintiff in error is engaged in a legitimate and valuable business, its product is of more value under the averments in the answer than the gas wasted, and there is no other way to produce it save the way adopted by the plaintiff in error. Further, it uses the gas that escapes as the power to force the oil to the surface.

Now, in case of the manufacturer, he leads the gas to his boiler through pipes and consumes it by

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burning to produce the steam in the boiler, from which the wheels of his manufactory are turned and the products of his shop turned out The gas thus burned is gone just as surely, just as effectually as the gas is gone that escapes from the wells of the plaintiff in error. But in going it has served its purpose, it has produced the steam from which the factory turns out its products. So with the gas that escapes from the oil well in the case at hand. In escaping it brings with it the more valuable product, oil, and having safely landed it upon the surface escapes and is gone. What is the difference in effect? It must be obvious that the purpose of this statute is to allow manufacturers and gas companies to use and appropriate all the gas in Indiana before any owner of an oil well can operate the same.

And we submit that it cannot be said to be waste, where, as here, of the two products found in the one well, that the more valuable is saved. It is not like the flambeaux case where the owner of the gas for the mere joy of burning and where it did him no good but did his neighbor injury turned the gas into flambeaux lights and burned them day and night. There there was no recompense; there there was no benefit derived by the farmer, and it might well be held in such a case strictly within the definition of Webster that such action on his part was reckless and extravagant waste.

But the State admits by its demurrer in this action that the oil the plaintiff in error saves is of more value than the gas which it uses in producing it. We submit, therefore, that under the facts admitted in this action it cannot be said either as matter of law or of reason that the plaintiff in error is wasting gas.

The case of Cooper vs. Woolley, L. R. 2d Exchеq., 87, is in point upon the question whether

allowing gas to escape under such circumstances is waste. An English statute prohibited the negligent use of furnaces in such a manner as not to make them consume the smoke as far as possible and provided a specific kind of smoke consumer and required the operators of furnaces to use the same. The defendant in that case was prosecuted for failure to use smoke consumers and for allowing smoke to escape. The defendant answered that he was a manufacturer of brass wire, that in the process of such manufacture it was necessary for him to anneal the material, and that if he should equip his furnace with the required smoke consumer that it would be impossible to anneal wire, because in so doing he would let currents of external air into the furnaces and thereby render the temperature uneven. He further admitted that although he was allowing smoke to escape, yet that he was allowing no more to escape than was necessary and consistent with the due exercise of his trade. And on such facts the Court of Exchequer held that he was not liable.

5. The Fish and Game Theory.

So far as we are aware, the first suggestion of an alleged analogy between oil and gas on the one hand and fish and wild animals on the other hand, was in the case of Gas Company vs. DeWitt, 130 Pa. St., 235. But in that case the Judge delivering the opinion himself queried whether the analogy was not too fanciful. And the same language was afterwards adopted by the Supreme Court of Indiana in Gas Company vs. Tyner, 131 Ind., 281. Never until the decision of the case in hand by the Supreme Court of Indiana, so far as we know, was it expressly held that there was any such analogy.

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It seems to us that there can be no foundation whatever for such theory. The difference in the character of the property needs only to be stated to show that a different rule should obtain. In the first sub-division of this brief we have already shown that all the States in the Union wherein gas and oil are produced, other than Indiana, that it has been expressly held that they are apart of the real estate, so long as they are in place. This being true when the State of Indiana parted with its title to the land within the State it thereby granted all the oil and gas that might be found therein as a part of the real estate itself.

By such deed the State lost all its interest as a proprietor in and to said minerals. If we should admit for the purpose of argument that oil and gas have the migratory character ascribed to them by the State, still that does not affect the property character of the two minerals.

The only result is, under all the cases, that if they migrate from the lands of one to those of another they become affixed to the real estate wherever found. And this is so the instant they enter upon such lands whether the owner thereof shall actually reduce them to possession or not. In other words, it needs no action on the part of the land owner to become possessed in fee simple of such minerals whenever they flow or enter upon his lands.

Not so with fish and wild game. By the grant of lands by the State, neither the fish in the streams nor the game in the forests were conveyed. They were not property at all until reduced to possession by some one. It needed further action on the part of some one to complete the title to the fish or the game, and then they were personal property.

Fish and game are animate; they possess within

themselves the power of locomotion; they may pass from stream to stream or from forest to forest without the aid of man. So far as we know, oil and gas remain in place in the strata where they are found until touched by the hand of man, and as we have before said, are a part of the realty and belong to the owner of the land in which they exist.

Again, we suppose that the real policy of the government as to the fish and game was that they should be reserved for the benefit of the people as a food supply. In such matters we apprehend that in case of famine or other public need the State without further ceremony would have the right in its sovereign capacity to capture and take all the fish in the streams and all the game in the forests and deliver them over to the starving. It was intended not merely to reserve the fish and game, but it was intended by so doing that they should grow and propagate and continue to furnish a supply of food for the people. If the proposition was made on the part of some manufacturer in Indiana or some gas company in Indiana was for themselves to take all the fish and all the game, we apprehend the Court would have no difficulty in reaching the conclusion that such proposition must be denied.

But again, if there should be a coal famine in Indiana or a fuel famine in that State we suppose no one would claim that the State would have a right absolutely to enter upon the lands of an individual owner, drill for gas and take the same without any compensation. Such a result must be true, however, if the claim of the State in this case is correct.

We suppose, too, that it would not be competent for the Legislature of Indiana to provide that a man shall keep intact the valuable timber upon his land or that he shall not cut the same down nor sell or

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dispose thereof in any manner. Yet for ages and long before the production of natural gas such was the fuel of this part of the country. And we submit that there is no more justice nor law in the proposition assumed by the State that it may control the gas, shut out the oil and compel the owner of both oil and gas to use the same only as it may suit the pleasure of the State who has no interest therein.

6. Nuisance.

It is asserted by the State and was decided by the Indiana Supreme Court in this case that the acts of the plaintiff in error in the use of the property in question constituted a public nuisance.

It certainly can not be said that such acts were a nuisance at common law. It is well settled that while a Court of Equity will enjoin a nuisance, and that the rights at law need not be first settled, yet it is equally well settled that the Courts require that a complainant should show by his bill that he has a legal right which has been violated.

> Wood on Nuisances, second edition, Section 788.

But in the case in hand what legal right has the plaintiff in error violated? For the purpose of the production of oil and gas upon the land in controversy the plaintiff in error is admitted by the pleadings to be the owner thereof, that is, it also appears from the pleadings that the State has no interest in the land in question nor in the oil and gas therein other than its supposed right as the guardian of the people to protect and save the same for the benefit of the entire State. But we submit that the State has no such interest. Such oil and gas under all the authorities above quoted are the absolute property of the plaintiff in error. There

is no averment in the bill in this case showing that the plaintiff in error is operating a concern either noxious, or noisy or detrimental to the health or happiness of any one. On the contrary, the answer alleges and the demurrer thereto admits that the business is being carried on with the highest skill, with the best appliances, in the usual and ordinary way and in the best way known to the skill and science of the world.

Furthermore, that the operations in question are conducted in the country, remote from village or habitation and where in the nature of things they could disturb no one.

It is apparent, therefore, that the whole of the contention is that the plaintiff in error, by the lawful use of its own property will cause a diminution of the supply of gas which might be obtained at a remote distance from its own property and by others drilling upon their own lands for the purpose of finding and producing gas. We have already shown that for such a diminution of supply that no other land owner would have a cause of action. We quote from the case of Kelly vs. The Ohio Oil Company, supra, the following:

> "The right to acquire, enjoy and own prop-
> "erty, carries with it the right to use it as the
> "owner pleases, so long as such use does not in-
> "terfere with the legal rights of others.
>
> "To drill an oil well near the line of one's
> "land, can not interfere with the legal rights
> "of the owner of the adjoining land, so long
> "as all operations are confined to the lands upon
> "which the well is drilled. Whatever gets
> "into the well belongs to the owner of the well,
> "no matter where it came from. In such cases
> "the well and its contents belong to the owner
> "or lessee of the land, and no one can tell to a
> "certainty from whence the oil, gas or water
> "which enters the well came, and no legal

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"right as to the same can be established "or enforced by an adjoining land owner."

"The right to drill and produce oil on one's "own land is absolute and can not be super- "vised or controlled by a Court or an adjoin- "ing land owner. So long as the operations "are legal, their reasonableness can not be "drawn in question."

It was held also in the case of Letts vs. Kessler, 54 Ohio St., 73, that it was intolerable that an owner of real property, before making improvements on his own land, should be compelled to submit to what his neighbor, or a Court of equity might regard as a reasonable use of his property.

We submit, therefore, that under the pleadings in this case and the facts admitted upon the face of the record that the plaintiff in error was doing nothing except to reasonably use its own property and that its actions did not constitute a nuisance either at the common law or under the statute of Indiana above referred to. And if as incidentally by the said use of its own property the supply of gas elsewhere should be diminished, such injury either to the State or any of its citizens is not a legal injury nor an invasion of any legal rights within the principles of the law.

Neither did such acts of the plaintiff in error constitute a nuisance under the general nuisance statute of Indiana. That statute is as follows:

"Whatever is injurious to health or inde- "cent or offensive to the senses or an obstruc- "tion to the free use of property so as to es- "sentially interfere with the comfortable "enjoyment of life or property is a nuisance "and the subject of an action."

Burns R. S. Ind., 1894, section 290.

The acts of the plaintiff in error did not violate this last named statute of Indiana for the reason

that there is no showing that there is any obstruction to the free use of property by others nor of the comfortable enjoyment of the property of others.

7. Conclusion.

We have abundantly shown, we think, that the title both to oil and gas is in the land owner, and that the State has no title nor legal right thereto.

It is also shown that the effect of the Indiana statute is to take away this property. In the Nebraska Maximum Freight Rate Case, decided by this Court on the 7th day of March, 1898, it was held that the Legislature had no power to take away the property of a railroad where the rate fixed was so low as to render it impossible to operate the road with profit. It was also held in that case that upon such subject the Legislature is not supreme but its acts are subject to the supervision of the Courts.

See also Laughton vs. Steel, 152 U. S., 133.

We believe that this effort by the State to disinherit one of its wards and cast the entire estate upon another is unparalleled in judicial and legislative history. The tendency of the Legislatures of some of the States to take away the rights of one business for the emolument of another is wisely being checked by this Court. The danger attending such legislation and the evil results threatened from popular elections was well set forth by Mr. Tredman in his preface to his book on police power. After showing that the American people for many years after the establishment of this country content with their own liberty and with the freedom from oppression of the Nobles and

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Crown, had no desire to infringe upon the property rights of others.

But in these latter days many such advantages are being sought through the medium of the General Assembly and as his conclusion upon that phase he says:

> "Contemplating these extraordinary de-
> "mands of the great army of discontents,
> "and their apparent power, with the growth
> "and development of universal suffrage, to
> "enforce their views of civil polity upon the
> "civilized world, the conservative classes
> "stand in constant fear of the advent of an
> "absolutism more tyrannical and more un-
> "reasoning than any before experienced by
> "man, the absolutism of a democratic ma-
> "jority."

We submit, therefore, with great confidence, that the judgment of the Supreme Court of Indiana should be in all things reversed.

Respectfully submitted,

STEPHENSON, SHIRTS & FERTIG,
M. F. ELLIOTT,
Attys. for Plaintiff in Error.

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No. 93

Supreme Court, U.S.
FILED
FEB 28 1894
JAMES H. MCKENNEY
Clerk

Filed Feb. 16, 1894.

In the Supreme Court of the United States.

October Term, 1893.

THE STATE OF INDIANA,
PLAINTIFF IN ERROR,
vs. } No. 993.
THE STATE OF INDIANA,
FOR THE USE OF HIGHLAND COUNTY,
DEFENDANT.

BRIEF OF COUNSEL OF THE STATE OF INDIANA.

The act of March 1, 1855, of Indiana, prohibiting the recovery of interest upon it, provides that

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE OHIO OIL COMPANY,
PLAINTIFF IN ERROR,
v.
THE STATE OF INDIANA,
For the Use of Madison County.

No. 308.

BRIEF ON BEHALF OF THE STATE OF INDIANA.

STATEMENT.

This case originated in the Circuit Court of Madison County, Indiana. It is based upon a complaint filed by the prosecuting attorney of that county for the recovery of a penalty provided by the act of March 4, 1893, of the general assembly of the state of Indiana.

Section 1 of that act provides:

> That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe re-

> ceptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles.

Section 3 of the same act provides a penalty of two hundred dollars for each violation, to be recovered in a civil action, in the name of the state, "for the use of the county in which such well shall be located, together with reasonable attorney's fees and costs of suit."

The defendant (plaintiff in error) demurred to each paragraph of complaint. The demurrer being overruled, the defendant answered, in substance, that the escape of gas from its wells, complained of in the complaint, was merely an incident to the production of oil, in which it was engaged; that no more gas was suffered to escape than was necessary; that its well was located remote from any city or town, and was so operated as not to endanger life, health or property; that no known machinery has been devised by which the escape of gas can be prevented, while producing oil from wells where both gas and oil are found in the same stratum of rock, and that the value of defendant's well will be entirely destroyed if it is compelled to desist from permitting the gas to escape, etc. (Rec., pp. 4 to 6, inclusive.)

To this answer the plaintiff demurred for want of facts sufficient to constitute a defense, which demurrer was sustained by the court. (Rec., p. 7.)

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The defendant refusing to plead further, the court rendered judgment in favor of the plaintiff for the amount of the penalty, and one hundred dollars attorneys' fees, after hearing evidence as to the value of such services. (Rec., p. 7.)

Upon appeal to the supreme court of the state the judgment was affirmed on the authority of the State of Indiana v. Ohio Oil Company, 150 Ind. 21, decided a short time previously. (Rec., p. 10.) The opinion in that case is found at pages 11 to 25, inclusive.

Thereupon the plaintiff in error filed its petition for a writ of error to the supreme court of the United States, and the case is brought here on the ground that the statute under which the action was prosecuted violates the fourteenth amendment to the constitution of the United States.

The question involved is, therefore, practically identical with that involved in the pending case of The Ohio Oil Company v. The State of Indiana (term No. 309). The only difference between the cases is the manner in which the question as to the constitutionality of the Indiana statute is raised.

In the last mentioned case the remedy prayed was an injunction, but in both the constitutionality of the same statute is directly involved. The plaintiff in error in each case is the same.

We have discussed the questions presented by the record on behalf of the state of Indiana, in the injunc-

tion case, much more fully than we care to do here, and we respectfully refer the court to the brief filed in that case. We desire, however, to present the questions there discussed in an abridged form here.

ARGUMENT.

Natural gas, as a subject of property, is analagous to animals wild by nature, in that, while in its natural state, and before it has been reduced to possession and control, it is the property of the state in its sovereign capacity.

Westmoreland, etc., Co. v. DeWitt, 130 Pa. St. 235; 5 L. R. A. 731;

People's Gas Company v. Tyner, 131 Ind. 277; 31 Am. S. 433; 16 L. R. A. 443;

Townsend v. The State, 147 Ind. 624; 62 Am. S. 477; 37 L. R. A. 294.

As a mineral *ferae naturae*, the state may regulate its production and prohibit its waste practically without limit. And in so doing the legislatures of the states are not restricted by the fourteenth amendment to the constitution of the United States, nor by the constitutional guarantics in favor of private property contained in the fundamental law of the states.

Jamieson v. Indiana Gas Co., 128 Ind. 555; 12 L. R. A. 652;

Townsend v. State, 147 Ind. 624;

Westmoreland, etc., Co. v. DeWitt, 130 Pa. St. 235;

State v. Rodman, 58 Minn. 393;
Gentile v. State, 29 Ind. 415;
Commonwealth v. Gilbert, 160 Mass. 157; 22 L. R. A. 439.

The right of legislatures of the states to regulate the use and prohibit the waste or destruction of property extends not only to that class in which the state, as sovereign, has a qualified ownership, but includes every species of property in the preservation and use of which the public has an interest, either because of its nature, or because the public health, the public safety, the public morals, or the general public welfare in any respect is involved.

Commonwealth v. Alger, 7 Cush. 53;
Bancroft v. City of Cambridge, 126 Mass. 438;
Commonwealth v. Tewksbury, 11 Met. 55;
State v. Schlemmer, 42 La. Ann. 1166;
Cooley's Constitutional Limitations, *pp. 88-89;
18 Am. and Eng. Enc. of Law, p. 745;
Davis v. State, 68 Ala. 58; 44 Am. 128;
Thorpe v. R. & B. R. R. Co., 27 Vt. 142; 62 Am. D. 625;
Hedderich v. State, 101 Ind. 564; 51 Am. 768;
Jamieson v. Indiana, etc., Gas Co., 128 Ind. p. 558; 12 L. R. A. 652;
State v. Peel Splint Coal Co., 36 W. Va. 130;

Health Department v. Trinity Church, 145 N. Y. 32; 45 Am. S. 578; 27 L. R. A. 710;
Rideout v. Knox, 148 Mass. 368;
Slaughter House Cases, 16 Wall. 36;
State ex rel. Clark v. Haworth, 122 Ind. 462;
Lawton v. Steele, 152 U. S. 133;
Commonwealth v. Gilbert, 160 Mass. 157;
Munn v. Illinois, 94 U. S. 113;
Budd v. New York, 143 U. S. 517;
Dow v. Beidelman, 125 U. S. 680;
Mugler v. Kansas, 123 U. S. 623;
Peik v. Railway Co., 94 U. S. 164;
Giozza v. Tiernan, 148 U. S. 657;
Gray v. Connecticut, 159 U. S. 74;
Plumley v. Massachusetts, 155 U. S. 461;
Powell v. Pennsylvania, 127 U. S. 678;
Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361;
United States v. North Bloomfield Gravel Mining Co., 81 Fed. 243, and 88 Fed. 664.

Now it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells. * * * In the disposition he may make of it (private property) he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of

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> public policy, or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public, as consumers, restrict and regulate it by statute.
>
> Hague v. Wheeler, 157 Pa. St. 324.

The rights of private property have always been subservient to the higher rights of the whole people, and, whenever it has been shown that a certain use of his property by the owner was inimical to the general welfare, the law-making powers of the several states have never hesitated to interdict such harmful use; and the courts have never denied the existence of such power in the legislature.

> At once concede that the coal industry is a proper subject for the exercise of police regulation and it follows by all the authorities that the legislature, and not the courts, is to judge of the propriety and reasonableness of any given regulation, provided it be enacted for the avowed police purpose and is not upon its face in excess of the police power claimed. *In other words, if any conceivable circumstances would justify the exercise of such police power, the legislature, and not the courts, is the judge of the existence and prevalence of such circumstances.*
>
> State v. Peel Splint Coal Co., 36 W. Va., p. 830.

In the case at bar the legislature of Indiana, with good reason, have seen fit to prohibit the waste of natural gas by suffering the same to escape from the wells into the open air; and the statute containing such inhibition is none the less constitutional because of its alleged interference with the operations of the oil producers, since the rights of the oil producer, as well as of every other individual, must yield to the paramount rights of the public, so far as the general welfare requires. The right of private property has never been so sacred that it might not be disturbed by the state in the exercise of its police power.

> All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community. * * * Without hazarding an opinion upon any other question we think that a law prohibiting an owner from removing the soil composing a natural embankment to a valuable navigable stream, port or harbor, is not such a taking, such an interference with the right and title of the owner as to give him a constitutional right to compensation, and to render an act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property which the legislature have authority to make.
>
> Commonwealth v. Tewksbury, 11 Met. 57.

It is impossible, we think, to distinguish this case from the case at bar. It is as much the duty of the legislature to protect its people against the destruction

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of their fuel supply as it is to protect those who live near the coast from overflow and inundation by the sea.

> The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts in nearly every state in the Union. It is universally conceded to include everything necessary to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. * * * Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.
>
> Lawton v. Steele, 152 U. S., p. 136.

The fourteenth amendment to the constitution of the United States was not intended to and does not abridge the police power of the several states. That power is as much a vital principle in the state governments since as it was before the adoption of the fourteenth amendment. Referring to the anti-oleomargarine law of Pennsylvania, this court said, in Powell v. Pennsylvania, 127 U. S., p. 683:

> It is contended that the last statute is void, in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights which are secured by the

> fourteenth amendment to the constitution of the United States. It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for those objects; and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states.

In that case the manufacturers offered to prove that their compound was entirely wholesome and free from any deleterious substance; but the court held that the constitutionality of the act could not be affected even if such contention were true, that being a matter entirely for legislative investigation.

> No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. This conclusion is unavoidable, unless the fourteenth amendment of the constitution takes from the states of the Union those powers of police that were reserved at the time the original constitution was adopted. But this court has declared, upon full consideration, in Barbier v. Connolly, 113 U. S. 31, that the fourteenth amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in re-

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spect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, *and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity.*

Mugler v. Kansas, 123 U. S., p. 663.

The decisions, however, are so numerous and so uniform upon the proposition that the police power of the states was not affected by the fourteenth amendment to the federal constitution that it seems useless to cite them.

It is really only a question as to whether or not, in the enactment of the statute here involved, the legislature of Indiana had in mind the welfare of the people to be conserved by the preservation of the natural gas supply of the state; or whether it was the intention to discriminate against the oil industry for the benefit of some other class or business, using the police power merely as a pretense. Of course there is no claim that if the latter theory was true the act would be valid. But who can doubt not only the good faith but the sound discretion that dictated the enactment of the statute assailed in this case.

The people of Indiana, in great part, had been almost wholly dependent for several years upon the

natural gas supply of the state for fuel. The industrial and commercial system of a large scope of country was based upon the advantages this great fuel supply offered to manufacturing enterprises. Hundreds of them would be shut down immediately if the supply failed. Thousands of employes would thereby be deprived of employment. The poverty and destitution that would follow is easily foreseen, but its extent is incalculable. The history of the natural gas development had already shown, when the act in question was passed, that while the supply was sufficient for legitimate purposes for many years, yet it was susceptible of being exhausted. The discovery of oil in a part of the same territory had occasioned extensive operations for the purpose of securing oil.

It is easy to understand the enormous drain on the gas deposit when hundreds of oil wells are sunk into the gas-bearing rock, each of which, producing enough gas to supply a fair-sized town, was permitted to remain uncapped and the product to discharge in the air. The history of the oil discoveries shows that the number of wells is not expressed by hundreds but by thousands in a few months after a rich discovery. It could thus be foretold, when the act in question was passed, that, unless restrictive legislation was enacted, the gas turned loose in the air would in a little while exceed many times the amount consumed by all the people of the state. It seems to us, therefore, impossible to avoid the conclusion that the welfare of the whole state was directly involved; that the commercial pros-

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perity of the people was in imminent danger and that, indirectly, not only the comfort and happiness but the educational, moral and social life of the community was at stake.

A natural gas deposit is analogous to a surface stream or lake, upon which is borne the traffic of a large community, and on the shores of which great industrial centers are nurtured. That such watercourses are directly within the power of congress or of the legislatures of the states, according to circumstances, to control, can not be doubted. Any obstruction or diversion of the water in such cases, even in the absence of statutory prohibition, is the subject of an action by any one who is injured thereby.

Wheatley v. Baugh, 25 Pa. St. 528;
Haldeman v. Bruckhart, 45 Pa. St. 514;
Saddler v. Lee, 66 Ga. 45;
Cross v. Kitts, 69 Cal. 217; 58 Am. 558;
27 Am. and Eng. Enc. of Law, 424;
New Albany & Salem R. R. Co. v. Peterson, 14 Ind. 112;
City of Greencastle v. Hazelett, 23 Ind. 186;
Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143; 6 L. R. A. 280;
People v. City of St. Louis, 10 Ill. 351;
People v. Truckee Lumber Co., 116 Cal. 397;
Commonwealth v. Pittsburg & Connellsville, etc., Co., 24 Pa. St. 159;
Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361;

Coosaw Mining Co. v. South Carolina, 144 U. S. 566;

United States v. North Bloomfield Gravel Mining Co., 81 Fed. 243;

North Bloomfield Gravel Mining Co. v. United States, 88 Fed. 664.

The discovery of natural gas necessarily involves the application of old principles to new conditions, though we do not believe it necessary for the court to depart from established principles in order to sustain the validity of the statutes designed for the preservation of the gas supply. However, even if that were so, the laws are not so inflexible as to afford no remedy for the injury sure to befall a large community when its chief support is withdrawn.

> It is therefore clear from the principles and the reasoning of all the cases that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location and course. * * * Geology is a progressive and now in many respects a practical science, and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, since the decisions in Acton v. Blundell, etc. * * * probably more deep wells have been drilled in western Pennsylvania than had previously been dug in the entire earth in all time. And that which was then held to be necessarily unknown and merely speculative as to the flow of water under ground

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had been by experts in such cases as this reduced almost to a certainty.

Collins v. Chartiers Valley Gas Co., 131 Pa. St., p. 159; 6 L. R. A. 280.

So also, with reference to the Indiana natural-gas deposit. It underlies a large territory, several thousand square miles in extent, and its boundaries have been clearly defined. In all essential respects its relations to the industrial life of the people is identical with that of a large surface water-course furnishing power for numerous mills, and constituting a highway over which immense traffic is carried on.

Extraordinary emergencies in many cases call for extraordinary remedies. * * * The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham: "That it is the duty of the courts of equity (and the same is true of all courts and of all institutions) to adapt its practice and course of procedure, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy." This rule the author (Judge Redfield) concludes is certainly worthy of one of the ablest, wisest and best judges that ever administered the chancery law of England or America.

Columbian Athletic Club v. State ex rel. McMahan, 143 Ind., p. 102.

It is difficult to imagine a subject appealing more strongly to the police power of the state for protection than the natural gas field of Indiana. The interests dependent upon it are so vast and affect so many of the people of the state, and the danger which threatened it was so imminent, that the wonder is the legislature of the state did not adopt more drastic measures to prohibit its waste.

In the enactment of the statute in question the legislature of Indiana was simply exercising that well-recognized, but not always clearly defined, function of government reserved to the states, known as the police power; and, this being established, the question as to whether or not the act was wise or unwise, whether or not it was too stringent or too lax, and whether or not it provided the best remedy for the existing evil, are matters of legislative concern purely. However, it must, we think, be conceded that the statute is most reasonable and mild in its terms, and that, if any individual or private interest is hurt by it, such injury is merely an incident in no wise affecting the constitutionality of the act, and not such an interference with or taking of private property as that contemplated by the prohibitions of the fourteenth amendment to the federal constitution.

Respectfully submitted, WM. L. TAYLOR,
Attorney-General of Indiana.

MERRILL MOORES,
C. C. SHIRLEY,
Counsel for Appellee.

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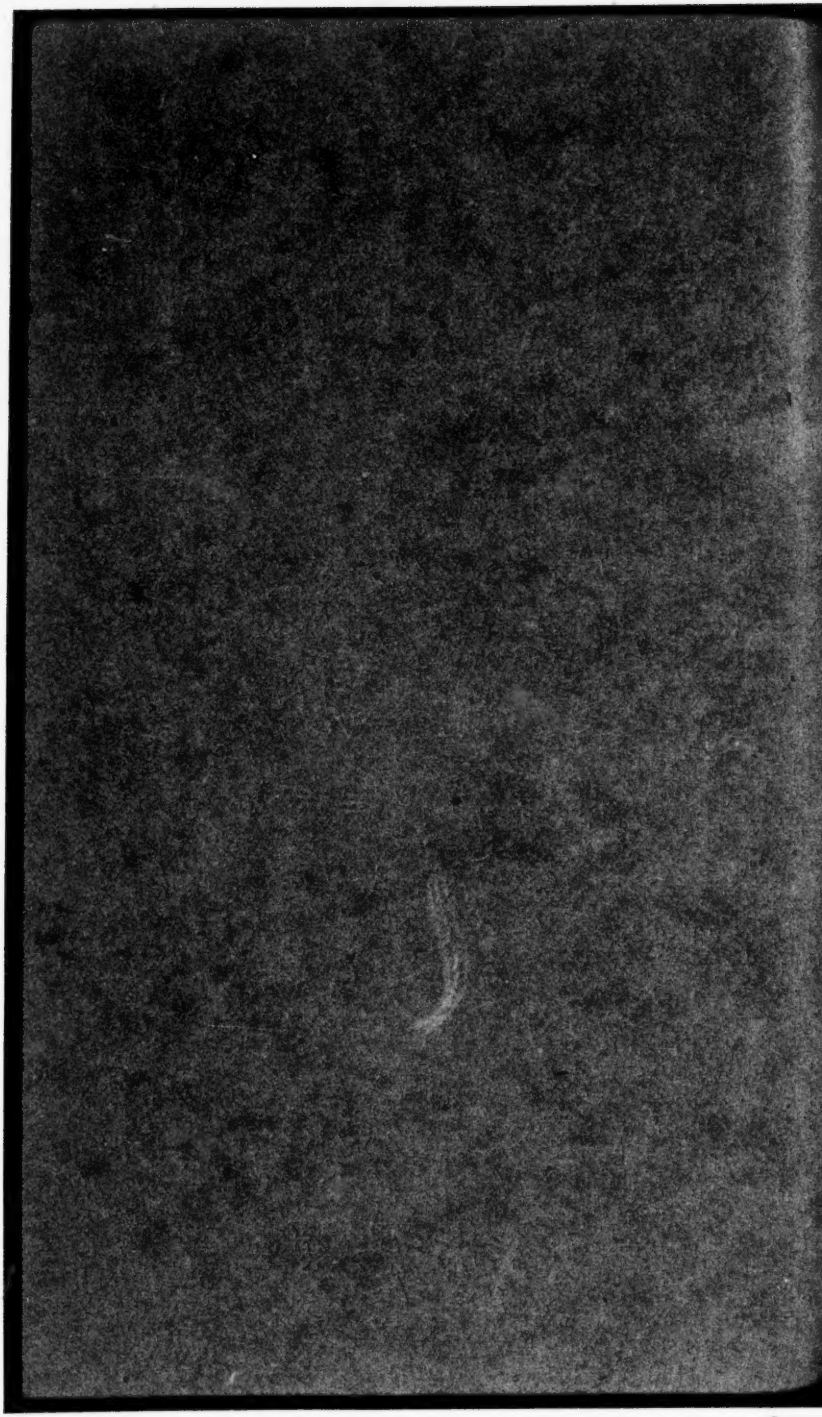

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE OHIO OIL COMPANY,
PLAINTIFF IN ERROR,
v.
THE STATE OF INDIANA.

No. 309.

BRIEF ON BEHALF OF THE STATE OF INDIANA.

STATEMENT.

The amended complaint in this case, which was filed on the 11th day of March, 1898, in the circuit court of Madison county, Indiana, charges, in substance, that for many years prior to that date there had existed underlying a large portion of the state of Indiana a vast deposit of natural gas occupying a reservoir of great extent, with well-defined boundaries, and used for fuel and light by the people of various populous cities of Indiana, as well as the residents of rural districts throughout many of the counties of said

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state; that, for the purpose of supplying the people of the state with such gas for fuel and light, many pipe-lines had been constructed, at vast cost, connecting the gas territory with a large portion of the population of the state; that the fuel and light so furnished was the cheapest and best known to civilization, and that for the purpose of availing themselves of the advantages afforded the people of said state had, at immense cost, equipped their houses with pipes and other appliances necessary to its use; that great manufacturing industries had been built up under the influence of the cheap fuel so furnished, a great number of which were wholly dependent upon the permanent continuance of the same; that these industries, during the years of their existence, had attracted many thousands of skilled laborers and mechanics to said state, who found remunerative employment in the mills, factories and other industrial and commercial enterprises so founded and maintained; that the public institutions, court houses, public school buildings and asylums of the state were supplied with natural gas obtained from said reservoir, and that the comfort, enjoyment, prosperity, and even health of that large community, numbering many hundreds of thousands of people, which for many years had been dependent upon natural gas fuel, would be greatly interrupted and disturbed if it should become exhausted; that on the 25th day of May, 1897, the defendant (plaintiff in error), had caused to be drilled near the city of

Alexandria, in Madison county, in said state, a number of wells, particularly located and described in the complaint; that each of these wells was sunk into the gas-bearing rock, which, as averred, also produced petroleum at that point, and that instead of securely anchoring said wells so as to confine the natural gas produced therefrom the defendant (plaintiff in error) had permitted the gas, for a long time, to escape in the open air, wasting many millions of cubic feet each day, and that defendant threatened to continue indefinitely to suffer the same to escape not only from the wells already drilled, but from other wells which it proposed to drill; that because of the immense drain upon said natural gas reservoir, caused by the open flow permitted by the plaintiff in error, the supply had already greatly diminished, and would in a short time become exhausted with the continued and increased operations threatened by the defendant.

The complaint proceeds to state with particularity the evils that will result from the wrongful acts of the defendant unless prevented by the court, showing beyond all question, if the facts pleaded are true, that nothing short of great public calamity is to be the direct and immediate consequence of the acts sought to be prohibited unless the chancery powers of the court shall intervene.

It further appears from the complaint that, though penalties are provided by law for the wrongful acts described, they have proven wholly inadequate to re-

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press the lawless operations of the defendant and other violators, who have openly defied the constituted authorities in their efforts to enforce the penalties pronounced against them by the statutes of the state. (Rec., pp. 2 to 6, inclusive.)

The defendant demurred to the complaint, and, after its demurrer was overruled, answered setting out the act of the general assembly of the state of Indiana, approved March 4, 1893, under which it is averred the action is prosecuted. This law, it will be observed, provides, among other things,

> That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles.

Section 3 of the act provides a penalty of two hundred dollars for each violation, and an additional penalty of two hundred dollars for each ten days such violation shall continue, to be recovered in a civil action in the name of the state of Indiana, for the use of the county in which said well is located, etc.

The answer further avers that, at the time and before the commencement of this action, it was engaged in the business of producing oil in Madison county, had expended large sums of money in procuring leases and drilling the wells in question; that the gas it was suffering to escape was of no value to it, and was produced merely as an incident to its oil operations; that, by suffering the gas to escape, it was enabled to raise the oil without artificial means, and that there is no known machinery or process by which the oil can be procured without suffering the gas confined in connection with it to escape. The defendant (plaintiff in error) therefore concludes that the act so set out violates the fourteenth amendment to the constitution of the United States, in that

> it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the law. (Rec., pp. 8 to 12, inclusive.)

To this answer a demurrer for want of facts was filed by the plaintiff (state of Indiana) which was sustained by the court, and, the defendant refusing to plead further, judgment was rendered against it, perpetually enjoining and prohibiting it from suffering or permitting any natural gas to escape from said wells and commanding it safely to confine all gas so produced in said wells, in pipes, tanks, or other safe receptacles. (Rec., p. 13.)

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The plaintiff in error appealed from the judgment of the Madison circuit court to the supreme court of Indiana, which, on the 21st day of April, 1898, the case having been advanced, affirmed the judgment of the court below. (Rec., p. 15.) The case was affirmed without argument or extensive comment, upon the authority of an earlier decision of the same case on a former appeal, reported as "State of Indiana v. Ohio Oil Company," 150 Ind. 21.

The opinion of the supreme court of Indiana in that appeal was by Judge McCabe, and is brought into the record of this case *in extenso* where it appears at pp. 15 to 29, inclusive.

On the 28th day of April, 1898, the plaintiff in error filed its petition for writ of error to the supreme court of Indiana. And the case is brought here on the sole ground that the state law incorporated in defendant's answer violates the fourteenth amendment to the constitution of the United States.

ARGUMENT.

It is scarcely necessary, we think, to urge that the natural gas interest of Indiana was, at the time the acts complained of were committed and for a series of years prior thereto, of such magnitude and affected so vitally the commercial and industrial prosperity of the state as to make its preservation a fit subject for regulation by legislative enactment. It was not a matter affecting only a neighborhood, but its influence was

of such wide extent as to have become inseparably interwoven with the industrial and social life of the whole people. It is admitted that this great subterranean fuel deposit filled a reservoir thousands of square miles in area, and that extending from it in every direction were conduits and pipe lines, bringing the volatile fluid into almost every furnace, forge and home within the major portion of the state of Indiana. The territory directly affected included the capital of the state, a city of nearly two hundred thousand people, and many other prosperous cities and towns, ranging in population from fifty thousand downward to the smallest hamlet. Throughout the entire territory reached by these numerous radiating pipe lines scarcely any other fuel than natural gas had been known for years. The very houses of the people (thousands of them) were so constructed as to admit of the use of no other kind of fuel without the reconstruction of the flues and other radical alterations. Millions of dollars of invested capital depended directly upon the life of this fuel supply. These large investments were primarily in manufacturing establishments, where tens of thousands of employes worked, and they, in turn, gave vitality to the commercial enterprises located in their respective communities. Villages formerly capable of supporting a population of a few hundred, or a few thousand at the most, had, since the discovery and development of this great natural resource, become populous and opu-

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lent cities, from and toward which constantly flowed an immense stream of commerce, enriching every department of trade. The very life of every one of these prosperous gas-belt cities depended upon the permanent supply of natural gas to the great factories from which they drew their chief support. To a very great extent the same thing was true as to the larger portion of the state, to which the gas was transported through extensive pipe line systems. The Mississippi river, before the first railroad was built, was not more important to the life and prosperity of the cities on its banks than was the great natural gas deposit of Indiana to the hundreds of thousands of people affected by it. There was, therefore, at the time the act of March 4, 1893, was passed, and at the time the complaint in this case was originally filed, the same broad question of public policy involved that would arise if one of the great waterways of the country should be threatened with permanent obstruction or diversion. The destruction of this natural gas resource, at the time the act in question was passed by the legislature of Indiana, meant not only disaster to the material affairs of its people, but, indirectly, increased vice and crime by multiplying many fold the pauper population of cities and casting upon society a vast army of unemployed mechanics and laborers, who would be absolutely without means of subsistence.

This was the condition of affairs at the time the legislature of Indiana addressed itself to the purpose of prohibiting, as far as possible, the waste and dissipation of natural gas. These are the conditions which must be kept in view in determining the constitutionality of the act assailed by the plaintiff in error. That a subject of such far reaching and vital importance to the whole people is one which properly appeals to the police power of the state, for its preservation must, we think, be recognized beyond peradventure.

The matters to which we have called the court's attention were within the knowledge of the supreme court of Indiana when this case was before it. They were also in the legislative mind when the act was passed. The discovery and development of natural gas, and the almost unprecedented impetus it gave to the business prosperity of the people were all matters of current historical interest. It would, therefore, have been little less than criminal on the part of the legislature of Indiana to have taken no steps to prevent the wholesale destruction of the natural gas supply of the state which at that time and subsequently threatened it.

It is clear, we think, that, in the exercise of their police power, the legislatures of the states are not embarrassed or restricted by the fourteenth amendment to the constitution of the United States.

Commonwealth v. Alger, 7 Cushing, 53;
Bancroft v. City of Cambridge, 126 Mass. 438;

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Commonwealth v. Tewksbury, 11 Met. 55;
State v. Schlemmer, 42 La. Ann. 1166;
Cooley's Con. Lim., pp. 88 and 89;
18 Am. and Eng. Enc. Law, p. 745;
Davis v. State, 68 Ala. 50; 44 Am. 128;
Thorpe v. R. & B. R. R. Co., 27 Vermont, 142; 62 Am. D. 625;
Hedderich v. State, 101 Ind. 564; 51 Am. 768;
Jamieson v. Indiana, etc., Gas Co., 128 Ind. 555; 12 L. R. A. 652;
State v. Peel Splint Coal Co., 36 W. Va. 130;
Health Department v. Trinity Church, 145 N. Y. 32; 45 Am. S. 578; 27 L. R. A. 710;
Rideout v. Knox, 148 Mass. 368; 12 Am. S. 560; 2 L. R. A. 81;
Slaughter House cases, 16 Wall. 36;
State ex rel. Clark v. Haworth, 122 Ind. 462;
Lawton v. Steele, 152 U. S. 133;
Commonwealth v. Gilbert, 160 Mass. 157;
Munn v. Illinois, 94 U. S. 113;
Budd v. New York, 143 U. S. 517;
Dow v. Beidelman, 125 U. S. 680;
Mugler v. Kansas, 123 U. S. 623;
Peik v. Railway Company, 94 U. S. 164;
Giozza v. Tiernan, 148 U. S. 657;
Gray v. Connecticut, 159 U. S. 74;
Plumley v. Massachusetts, 155 U. S. 461;
Powell v. Pennsylvania, 127 U. S. 678;

Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361;
United States v. North Bloomfield Gravel Mining Co., 81 Fed. 243;
North Bloomfield Gravel Mining Co. v. United States, 88 Fed. 664.

Natural gas, unlike ordinary property is, when in its natural state, fugitive and unstable in character, like game in the forest, fish in the streams, or birds of the air. It has, indeed, been held, long before the decision of the case at bar, when in its original position in the bowels of the earth, not to be in the ordinary sense the subject of private ownership. The rule established in Indiana with respect to property rights in natural gas is, we believe, both logical and just. It is to the effect that before it is reduced to subjection and control it belongs to the state in its sovereign capacity. In this respect, natural gas has been aptly styled in Pennsylvania, in Indiana, and elsewhere, where it is largely produced, a mineral *ferae naturae.*

Following this analogy it has been held to bear a relation to the sovereign and to the rule of private ownership similar to that sustained by fish and wild animals.

People's Gas Co. v. Tyner, 131 Ind. 277; 31 Am. S. 433; 16 L. R. A. 443;
Jamieson v. Natural Gas Co., 128 Ind. 555;
Townsend v. The State, 147 Ind. 624; 62 Am. S. 427; 37 L. R. A. 294;

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Westmoreland, etc., Co. v. DeWitt, 130 Pa. St. 235; 5 L. R. A. 731.

This analogy was first pointed out, so far as we have been able to discover, in the case of Westmoreland, etc., Company v. DeWitt, 130 Pa. St. 235, the doctrine there enunciated being quoted with approval by the supreme court of Indiana in the People's Gas Company v. Tyner, 131 Ind. p. 281. It is as follows:

> Water and oil, and still more strongly gas, may be classed by authorities, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals and unlike other minerals they have the power and the tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract is uncertain. They belong to the owner of the land and are part of it so long as they are on or in it and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner drills his own land and taps your gas so that it come into his well and under his control it is no longer yours but his.

The analogy between animals *ferae naturae* is peculiarly apt. As property the law of necessity operates upon them much in the same way. One cannot wantonly destroy fish in the streams even though on his own land without injuring the public. Neither

can he destroy game birds and animals indiscriminately without, in like manner, injuring the public. The state has always exercised a guardianship over the fish in the streams and the birds in its forests. This is because the public welfare requires their preservation. As articles of food, and even for the pleasure and enjoyment of the people, the public are interested in their protection. It is therefore within the police power of the state to regulate their use.

Not only may the state restrict and control the individual with respect to such property while actually in a wild state, but for the purpose of accomplishing the object of such regulation it may even control the right of the owner of such property lawfully reduced to possession, and, therefore, as much the private property of him who possesses it as any other article of property. It is not because fish and animals, wild by nature, are not the subject of property that the state assumes to control and regulate their use and consumption. On the contrary, nothing is clearer than that they are the subject of private ownership when reduced to possession. It is because, notwithstanding such ownership, the public interest requires the preservation of such animals and fish, that the police power is able to regulate their use and enjoyment by the owner after possession and control have been acquired, as well as before.

The state has no *proprietary* interest in animals wild by nature either before or after their capture. Before capture, however, the state has such interest,

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and only such, as the sovereign possesses in all property belonging to the whole people. After capture they belong, as we have already seen, absolutely to the person taking them.

State v. Rodman, 58 Minn. p. 400.

In that case the legislature of Minnesota had made it unlawful for one to have possession of certain kinds of game within five days of the close season. The argument of those attacking the constitutionality of the act was that game taken at the time was lawfully taken, and when so taken it was not within the police power of the state to regulate it. This is the answer of the supreme court of Minnesota to that argument:

> We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common. The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the state, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game and secure its beneficial use in the future to the citizens, and, to that end, it may adopt any reasonable regulations not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession.

It will be observed that in State v. Rodman the proposition is emphasized that property in wild animals before capture is in the state (by which is meant, however, that qualified ownership which is the attribute of sovereignty). The analogy between such cases as the State v. Rodman and this is exceedingly strong, in that whatever may be the proprietary rights of individuals in natural gas when reduced to possession, so long as it retains its fugitive and elusive character in the earth, flowing continually from one man's property to another's, its relation to the state must be similar to that of wild animals. This we understand to be the Pennsylvania doctrine as established in Westmoreland v. DeWitt, *supra*; and this we understand to be the Indiana doctrine as established by Peoples' Gas Company v. Tyner, *supra*.

But the power to regulate the slaughter as well as the use of and commerce in wild animals and fish is not confined to cases in which the state has even the qualified ownership attributed to it in the Rodman case.

In the case of Commonwealth v. Gilbert, 160 Mass. 157, the supreme court of Massachusetts applied the statute prohibiting the sale of trout at certain seasons, to trout propagated, reared and held as private property; and in the same decision affirmed the constitutionality of the act in this language:

> Nor have we any doubt that the statute is constitutional. The importance of preserving from extinction or undue depletion the trout or other

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> useful fishes in the waters of the commonwealth has been regulated and illustrated in many familiar statutes and decisions from an early time. Such protection has always been deemed for the good and welfare of the commonwealth, and the legislature may pass reasonable laws to promote it. Such laws are not to be held unreasonable because owners of property may thereby to some extent be restricted in its use. It has often been declared that all property is acquired and held under the tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community.

It cannot certainly be contended with reason that the property right of the owner of land overlying a small fraction of the vast subterranean gas deposit is higher, so far as any part of such gas is concerned, than that of one engaged in fish culture, in fish propagated by himself, on his own premises, under his own control, especially after the same are taken from the water and prepared for food.

Much less can it be contended that the interests of the state and of the whole people are less affected by the destruction of the natural gas supply than by the destruction of the fish supply. Not all the fish within the waters of Indiana, since the first white man built his cabin on the banks of the Wabash, have been worth commercially a tithe of the value of the natural gas product of the state for a single year.

In Townsend v. State, 147 Ind. p. 631, the supreme court of Indiana, affirming the constitutionality

of what is known as the flambeau law of the state, enacted, like the statute here in controversy, for the prevention of waste, very justly used, with reference to the former decisions of that court, sustaining the validity of the game and fish laws of the state, the following language:

> That was the assertion of a far greater and more sweeping power than is involved in the act now before us. It only attempts to restrain all persons from drawing from the general reservoir of nature a needless amount of natural gas only to be wasted. All persons in the state are far more interested in preventing such needless waste of gas than they were in preventing the owners of lakes and streams from taking any fish at all therefrom for a period of two years, though for necessary food.

The particular case to which reference was made in the opinion, from which the preceding excerpt was taken, was Gentile v. State, 29 Ind. 415. In that case it was held that a statute prohibiting absolutely the taking of fish from any of the streams and waters of the state for two years immediately succeeding its passage was constitutional as an exercise of police power.

In the same case the court further say, on page 627, with reference to the claim that natural gas was private property, and therefore immune from the operation of the state's police power:

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> While our republican government guarantees the right to pursue one's own happiness, yet that government is charged with the duty of protecting others than appellant in the pursuit of their happiness, and hence the inalienable right to pursue one's own business must necessarily be subject to the same right in all others. Hence, when that right is asserted in such a manner as to conflict with the equal right to the same thing in others it is not an inalienable right, nor a right at all, but is a wrong. * * * If, therefore, it makes appellant happy to waste natural gas for the want of which others are made to suffer and be unhappy as the direct result of such waste, then the pursuit of such happiness is not an inalienable right but a positive wrong. * * * It (the flambeau act) restrains him from wasting the gas to the injury of others, and to the injury of the public. It might present a very different and serious question whether the legislature has the power to prevent him from wasting his own property, if, by so doing, he in no way injured others, as appellant's learned counsel erroneously assume (p. 628).

This, we respectfully urge, is not only a correct but a very clear statement of the doctrine of police power with respect to the protection of the natural gas supply of the state. It recognizes the existence of certain rights in natural gas in its subterranean bed in others besides the land owner under whose land the same is found. If such rights exist it is both competent and proper to protect them by law. The land owner is not, in an unqualified sense, the owner of everything

that may temporarily inhabit the air above his premises or the soil beneath. Natural gas is one of Nature's elements, like air and water. The doctrine of private ownership in land from the zenith to the center of the earth includes all fixed and permanent substances below the surface; but it does not, we think, include natural gas any more than it includes the east wind. The reasons for this distinction are obvious. It is not contended that the individual land owner possesses the air above his property, nor that he has any proprietary interest in the flock of wild birds that happen to fly over his premises. The title to wild animals frequenting his land is not in the owner, and that the legislature, under the police power, has the right to regulate and prohibit the slaughter of game by the land owner is not now open to dispute. He can assert no greater right to take game in the close season on his own land than he can on the land of another.

This title-to-the-center-of-the-earth doctrine, as applied to natural gas, overlooks the essential difference between this species of property and the ordinary minerals. The latter are permanently fixed as a part of the realty; they have no power of locomotion; they are not migratory. On the other hand, natural gas is in constant motion like the air, passing from one man's land to another's, stealthily and imperceptibly, though continually, and it escapes and loses itself the moment it is released from its subterranean confine-

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ment. Why should natural gas, in its original state, be deemed part of the soil any more than wild game or birds in the air? They are alike elusive, migratory and beyond the control or direction of the land owner. The owner of land has no absolute proprietary right to the wild animals that frequent its forests, or fish found in its streams, the birds that inhabit the air above it or the natural gas beneath its surface until they have been reduced to possession. Before that time they belong to the state in its sovereign capacity. There can be no such thing, therefore, as depriving the owner of property in them, even by a legislation absolutely prohibiting the owner from taking them for his private use. One cannot be deprived of what he does not possess; and therefore, since there is no absolute right in the land owner to appropriate this species of property to his exclusive individual use, a statute prohibiting him from so doing deprives him of no right which he before possessed.

An early Indiana statute, to which we have already referred, prohibited the taking of fish for a period of two years from and after taking effect of the act, even by the owner of the lake or stream in which they were propagated. The validity of that law was assailed on the ground that it violated the constitutional guaranties against the taking of private property without compensation contained in the Bill of Rights. To that contention the supreme court of Indiana responded, in Gentile v. State, 29 Ind. pp. 415, 417, as follows:

> And it is claimed that this right to fish may be exercised at all times at the will of the land owner and is not subject to be controlled, restrained or abridged by the legislature. * * *
>
> The proposition of appellant's counsel is erroneous in confounding the exclusive right of the owner of the stream to fish therein with the right of property in the fish before they are taken. But the fish are *ferae naturae*, and as far as any right of property in them can exist it is in the public, or is common to all. No individual property in them exists until they are taken and reduced to actual possession.

The doctrine thus laid down is quoted and approved by the same court in the flambeau case and applied to property in natural gas; and there is both reason and authority supporting the rule so applied. The legislature has the right, for the purpose of conserving the fish and game, not only to prescribe the manner in which, and the season when the same may be lawfully taken, but it has the right absolutely to prohibit its capture.

Natural gas being, like fish and wild animals, the property of the sovereign people, is the especial charge and ward of the legislature, which may prescribe conditions under which property rights may attach. There is no presumption that this plenary power will be abused by the legislature, nor that it can not be as safely lodged in its hands as in the hands of the courts.

If the people of the state in their sovereign power, through their chosen representatives in the legislature,

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should see fit, in the interest of the natural gas resources of the state to provide that no oil should be taken from any portion of the natural gas territory until its gas product had been consumed, upon what constitutional ground could their right to do so be disputed? Certainly not because it is inimical to the fourteenth amendment to the constitution of the United States.

The statute of 1893 operates upon oil and gas in their natural state. It does not undertake to forbid or restrict the use of, or commerce in, such products, after individual property rights have become fixed by reducing the same to possession. The violation of the act complained of occurred not after either product had been reduced to possession, but in the act of subduing the one without any effort to subdue the other.

Exclusive private property right never vests in natural gas or oil permitted to flow into the open air from the mouth of the well.

However, under the doctrine that classifies natural gas and oil with animals *ferae naturae*, the legislature has the right, for the sake of protecting the same when not yet reduced to possession, to restrict, regulate and control the use and commerce in these products even when lawfully in possession.

The plaintiff in error falls far short of establishing the unconstitutionality of the act in question even if its theory of private ownership were conceded. We are aware of no rule of constitutional law exempting

private property from the operation of the police power. The question of title we regard as of only secondary importance. The right of the legislature under the police power to prohibit the waste and regulate the use of natural gas does not depend upon the legal analogy it bears to animals wild by nature. It is subject to the police power both on account of its physical character as an explosive and therefore dangerous element, and also on account of the intimate relation its preservation bears to the prosperity of the whole people; and the general commercial disaster, and the no less important, because indirect, social detriment sure to follow its exhaustion.

Natural gas is to the law a comparatively new thing. There is abundant authority to justify the court in departing, if necessary, from established principles as applied to other classes of property in order to meet the novel conditions created by the discovery and development of natural gas and the immense commercial and industrial system dependent upon it. We think, however, that a careful examination of the cases bearing upon subjects more or less analogous, will reveal the existence of established rules which only need be applied in order to conserve these vast and varied interests, beneficial alike to their promoters and to the whole people.

Natural gas partakes somewhat of the nature of ordinary minerals, and yet is distinguished from that class of property in other important respects. It has

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certain points in common with subterranean waters, but the contrast in character between these two elements is even more striking than their points of similarity. While differing in its subterranean position, the natural gas reservoir of Indiana, so far as the purpose of this inquiry is concerned, bears closer legal analogy to its lakes and rivers than to anything else with which it can be compared. It is similar in its territorial extent, in that its boundaries are reasonably well defined, in that vast commercial interests have been fostered and built up by it and must inevitably collapse when it is drained. These considerations we respectfully insist should outweigh the purely arbitrary distinction that separates subterranean from surface waters. It has sometimes been assumed that natural gas, because found beneath the surface of the earth, is subject to the rules of law applicable to subterranean waters only; and that rights with respect to surface waters have nothing in common with those flowing from the discovery and utilization of subterranean natural gas deposits. This, we believe, is an erroneous assumption. It is true there is a distinction between the relative rights of riparian owners and those through whose soil are found percolations of water. This distinction, however, is not founded upon the arbitrary fact that in the one case the water is above, while in the other it is below the surface of the earth. It can not be denied that to some extent it is founded upon the ancient theory that the ownership

of the soil extends to the center of the earth and includes every substance found in and under it. More especially it arises from the supposed impossibility of determining the course or channel of subterranean streams and the extent, direction and origin of mere percolations of water. But chiefly it is due to the vast disparity between the enormous utilities to which surface waters may be applied as distinguished from the comparatively limited and unimportant uses of subterranean waters. When we say the uses of subterranean waters are limited and unimportant we mean that so far as people in general are concerned the use of any single subterranean stream is limited and unimportant. A spring of water is often of great importance to the man on whose farm it is found, likewise it is often of great importance to the individual to be able to find beneath his soil a vein of pure wholesome water for domestic purposes. The particular spring or vein of water, however, while of great importance to the individual owner, cannot be said to work any important or appreciable effect upon the industrial or commercial system of the state or country. The well or spring may be polluted or diverted without injury to any save the owner himself, or at most a few of his immediate neighbors. Even when the owner is damaged, generally speaking, one of his neighbors is correspondingly benefited, by being able to tap the subterranean vein a little nearer its source; so that the state at large is not affected in the least, and even the immediate com-

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munity feels no detrimental consequences. Of course the question as to whether or not a given territory has an adequate supply of drinking water accessible to its people is one of large importance. But it is the aggregation of minute and wandering veins and percolations not directly connected with each other that together become an immediate factor in the welfare of the people and not the tiny individual current, the source, direction and origin of which are generally unknown. It is therefore not difficult to understand why the courts have often declined to lend their chancery powers to prevent the diversion of subterranean streams and percolations by one land owner at the suit of a neighboring owner. It is worthy of notice, however, that these cases without exception, so far as we have observed, have undertaken to deal with the common law rights of individuals merely. They have not gone so far as to hold, even with respect to subterranean waters, that the police power of the state may not be invoked to protect and regulate the water supply. We have no doubt that sufficient authority exists in the state legislatures to meet any case where the water supply of the people of a large section of the commonwealth is threatened with pollution or exhaustion.

It is upon these and perhaps other considerations quite as much of policy as of principle that, as a general rule, one who diverts a subterranean water course for his own use is not, in the absence of statutory regulations, liable to an adjacent owner whose supply of

water is cut off by such diversion, whereas the authorities universally hold that one who diverts or harmfully obstructs or pollutes the waters of a surface stream is liable in damages not only to the state as the representative of the people, but to the owner whose use of the water below is interrupted.

New Albany & Salem R. R. Co. v. Peterson, 14 Ind. 112; 77 Am. D. 60;
City of Greencastle v. Hazelett, 23 Ind. 186;
Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143;
Osbon v. Chartiers Valley Gas Co., 6 L. R. A. 280;
People v. City of St. Louis, 10 Ill. 351; 48 Am. D. 339;
People v. Truckee Lumber Co., 116 Cal. 397; 58 Am. S. 183; 39 L. R. A. 581;
Commonwealth v. Pittsburg & Connellsville Ry. Co., 24 Pa. St. 159;
Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361, 363, 364;
Coosaw Mining Co. v. South Carolina, 144 U. S. 566;
United States v. North Bloomfield Gravel Mining Co., 81 Fed. 243;
North Bloomfield Gravel Mining Co. v. United States, 88 Fed. 664.

From the opinion of Collins v. The Chartiers Valley Gas Company, 131 Pa. St. 158, we have taken

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the following extract, to which we invite the attention of the court:

> A surface stream can not be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterraneous percolation or stream. One can hardly have rights upon another's lands which are imperceptible, of which neither himself nor that other can have any knowledge. * * * It is therefore clear from the principles and the reasoning of all the cases, that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual, or reasonably required, of their existence, location and course. * * * Geology is a progressive and now in many respects a practical science; and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, since the decisions in Acton v. Blundell, etc., * * * probably more deep wells have been drilled in western Pennsylvania than had previously been dug in the entire earth in all time. And that which was then held to be necessarily unknown or merely speculative as to the flow of water under ground has been by experience in such cases as this reduced almost to a certainty.

In the case from which we have just quoted it was held that one who polluted a subterranean water course flowing fresh water by mingling with its current salt water developed in the process of mining, was liable in damages to one whose supply of fresh

water was thereby destroyed. The case is therefore important in two particulars: first, because it recognizes the progressive tendency of the law and its policy in keeping step with the advancement of science and universal knowledge. Secondly, it recognizes the rule that the doctrine of *damnum absque injuria* is not universally applied, even in cases growing out of the pollution or diversion of subterranean waters.

Where the conditions are similar, there is no reason why the rules of law applicable to surface waters and subterranean waters should be different; and the authorities are to the effect that there is no difference.

Wheatley v. Baugh, 25 Penn. St. 528 (64 Am. Dec. 721);
Haldeman v. Bruckhart, 45 Penn. St. 514, (84 Am. Dec. 511);
Saddler v. Lee, 66 Ga. 45 (42 Am. 62);
Cross v. Kitts, 69 Cal. 217; 58 Am. 558-562 (27 Am. & Eng. Enc. of Law, 424).

Now let us suppose the discovery of a large subterranean stream of water, the source, direction and outlet of which were all perfectly defined. This stream traverses a populous scope of country of great extent, and is of such character that hundreds of factories, in which thousands of workmen find employment, are supplied with power by its current. During the years following its discovery and the development and growth of these industrial enterprises the whole commercial system along its course, and for many miles

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on either side thereof, has become so interwoven with its life and continued existence as to make its diversion, and much more, its complete destruction, no less than a widespread public calamity. Suppose further, that, for some selfish purpose of its own, a large corporation, or combination of capital, should be directed to the diversion of this subterranean current so that its inestimable advantages should be completely lost, and the manifold interests dependent upon it destroyed, will it be seriously insisted that, at the suit of the state, by its attorney-general, in the interests of the people, a court of equity, even in the absence of statutory provision, would be powerless to afford any relief, or to avert such threatened disaster? It seems to us that the question need only be asked in order to carry its own answer. Now, if, in the absence of legislation, such power exists in the courts, much less can it be denied that the legislature of the state, speaking as the direct representative of the people in their sovereign capacity, has the indubitable right, under its police power, to prohibit any such threatened injury to so large a portion of its population? Nor would it be any answer in such a case for the wrongdoer to say, "I own the land on which my operations are being prosecuted, and since my title is from the zenith to the center of the earth, and includes the water flowing through and under my soil, I can therefore divert its current at will, regardless of the welfare of the whole state, and notwithstanding my act may mean ruin, destitution and pauperism to thousands."

Nor is the rule questioned that an owner of land bordering a lake of water on the surface of the ground, would be liable not only to the state, but to every other owner specially injured by his act if he should drain the waters of such lake even to furnish power to run his mill, much more if such waters were drained only to be wasted.

Taylor v. Fickas, 64 Ind. 167; 31 Am. 114;
Hebron Gr. R. Co. v. Harvey, 90 Ind. 192; 46 Am. 199;
Weddell v. Hapner, 124 Ind. 314;
Thunder Bay Co. v. Speechly, 31 Mich. 336; 18 Am. 184;
Morrill v. St. Anthony Falls Co., 26 Minn. 222; 37 Am. 399;
Fernald v. Knox Co., 82 Me. 48;
Delaplaine v. Chicago R. R. Co., 42 Wis. 214; 24 Am. 386.

And if there is sufficient virtue and authority in the equity arm of the courts to prevent a diversion or destruction of a surface stream or lake, or particularly the hypothetical subterranean course we have described, much more ought that same strong arm to be stretched to prevent the absolute destruction of the Indiana natural gas field, with all the attendant evil consequences; because, in addition to the commercial interests at stake, natural gas, from its very nature, invites the exercise of police power. Whatever may be said as to the utility of subterranean waters, or as

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to the uncertainty of our knowledge with respect to their origin, their course, and the extent of the supply, this court will notice certain well-established facts with respect to the great subterranean natural gas lake of Indiana. There is no uncertainty about it. It has well-defined boundaries with reference to which vast commercial interests have adjusted themselves. That it can be exhausted has also been demonstrated, as certainly as that it exists. That it has been a source of incalculable wealth and prosperity, no one will deny. It is impossible that one, who deliberately taps this reservoir with a drill and suffers its contents to escape into the open air, can be ignorant of the tremendous injury which he inflicts upon every one whose property and business directly depend upon the continued existence of the supply. Having knowledge of the consequences of his act, he will be presumed to have intended such consequences. It therefore becomes a question whether the state may, in the exercise of its police power, prohibit the intentional destruction of its greatest natural resource.

The case of Hague v. Wheeler, 157 Penn. St. 324, has been invoked by the plaintiff in error as authority for the doctrine that the owner of the surface, as the owner of everything beneath the surface, may with impunity sink a well upon his own premises into a natural gas reservoir and permit its contents to escape in the air even though the gas under his neighbor's land, and under the land of thousands of others may

also escape in common with his own. That case falls far short of deciding any question essential to the determination of this case. In the first place, the suit was brought by an individual land owner against a neighboring land owner. Secondly, there was no question raised there as to the power of the legislature to prohibit waste. Third, the courts, in deciding that case, distinctly state that the subject is one justifying legislative control, in the following language:

> Now it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells; but it is not the public interest that is involved in this litigation. It is the interest of an adjoining owner, who seeks to appropriate to himself so much of his neighbor's gas as he can not turn into money, or use for some practical business purpose, and he asks a court of equity to hold his neighbor's hands, by an injunction, until this appropriation is accomplished.

The closing paragraph of the court's opinion is also quite significant of that tribunal's thorough assent to the proposition that whether the title to subterranean deposits of natural gas be in the surface owner, or in the sovereign, the latter has such an interest as justifies legislation regulating its use and prohibiting its waste. It is as follows:

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> In the disposition he may make of it (private property) he is subject to two limitations. He must not disregard his obligations to the public, he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute, until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute.

So far, therefore, from denying the power of the legislature to prohibit the waste of natural gas, the supreme court of Pennsylvania distinctly recognizes the existence of such power, if it does not undertake to suggest its exercise.

It was known as a part of the history of the state, when the act in controversy was passed, that vast investments had been made throughout what is known as the gas belt of Indiana, upon the strength and permanence of this gas supply. These varied interests had adjusted themselves with reference to this subterranean reservoir of gas just as the multiplied utilities of commerce adjust themselves with reference to and depend upon the continued and undisturbed flow of a river, the banks of which are lined with mills operated by the power of its current. This is, as we under-

stand the doctrine of Collins v. Chartiers Valley Gas Company, 131 Pa. St. 143, a vital point in determining the question as to whether the subject is one in which the public has such an interest as to invoke the exercise of the police power of the state. In respect to its uses, its extent, its well-defined boundaries and the mighty interests dependent upon its protection, it is identical with the great water-ways and lakes of the country. It bears little, if any, practical analogy to mere subterranean veins or percolations of water. It is not proper to say, therefore, that those who are thus directly interested, and under whose land this great natural gas lake extends have no better rights in courts of equity to insist upon the protection of the natural gas supply than has the land owner who seeks to enjoin the diversion of a small subterranean vein of water.

It will be observed, too, from examination of the authorities, that the doctrine that permits one land owner to divert subterranean water presupposes an intention on the part of the person so diverting the same to devote it to some substantial use. In this case there is no pretense that the gas suffered to escape from the wells of the plaintiff in error was utilized for any purpose whatever. Its volatile character insures its complete annihilation as a valuable substance the moment it escapes in the air. It is true the answer of the plaintiff in error (defendant below) avers that the gas is utilized in bringing the oil to the surface. This,

however, is no utilization at all. The fact that in escaping the gas causes oil to rise in the form of spray is a mere incident to its escape. The escaping gas is at no time brought under the control of the oil producer in any manner whatever. It elevates, not because the producer wills it, but merely because its expansive force is such that when an outlet is opened it seeks the aperture with such velocity and force as to carry everything before it, and immediately loses its identity in the upper atmosphere.

The adaptability of equity to the changing conditions of modern life and recent discoveries is such as to bring within its operation any subject of such tremendous importance to the general welfare as the preservation of the Indiana natural gas field. This doctrine has been thus expressed by the supreme court of Indiana in a late case:

> Extraordinary emergencies in many cases call for extraordinary remedies. The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham: "That it is the duty of the courts of equity (and the same is true of all courts and all institutions) to 'adapt its practice and course of proceeding as far as possible to the existing state of society and to apply its jurisdiction to all those new cases, which from the progress daily making in the affairs of men, must continually arise and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is

no other remedy.'" This rule the author (Judge Redfield) concludes is certainly worthy of one of the ablest, wisest and best judges that ever administered the chancery law of England or America.

Columbian Athletic Club v. State ex rel. McMahan, 143 Ind. 98; 52 Am. S. 407; 28 L. R. A. 727.

We commend these words to the careful consideration of all those who will see no distinction between the rights of the public in vast reservoirs of natural gas forming a common supply to hundreds of thousands of people, and the ordinary articles of property belonging to individuals and with the disposition of which the public welfare is not in the least concerned. Nor can the rights of the people with respect to this great natural resource be circumscribed by the narrow rules which apply to subterranean percolations of water. We by no means concede that the legislature of the state may not, if it should see fit, regulate the use and prohibit the waste, pollution or diversion of the subterranean water-courses of the state. On the contrary, we repeat, that in case the public welfare should call for legislation of this kind, the rule of private ownership would be deemed impotent to prevent its enactment in the form of reasonable police regulations. However, we are now discussing the essential character of natural gas deposits, together with the rights of individual owners therein and the correlative rights of the public with respect thereto, irrespective of the act of the Indiana general assembly, the consti-

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tutionality of which is assailed in this case. For it can not be successfully maintained that a police regulation violates the fourteenth amendment to the constitution of the United States as an interference with the free use and enjoyment of private property, if the people of the state, through the attorney-general, prior to the enactment of such a police regulation, had the right to prevent, by injunctive proceedings, the acts sought to be prohibited by the legislation in question.

The proposition seems clear to us that this is precisely the situation with reference to the question now before this court. Even if the act of 1893 had not been passed, we have no doubt that the complaint filed by the attorney-general, as a representative of the whole people, would have stated a cause of action calling for the interposition of the prohibitive power of equity. If we are right on this point, then it seems to us necessarily to follow that the statute in question in no wise transcends any provision of the fourteenth amendment to the federal constitution. When the rule with respect to percolating waters was established natural gas was unknown. But, even if known and properly classified with subterranean waters, the rules of equity and of law are sufficiently flexible to accommodate themselves to the advance, even to the revolutions, which science, commerce and the other elements of modern progress have accomplished.

Referring to the anti-oleomargarine law of Pennsylvania, this court, in Powell v. Pennsylvania, 127 U. S. p. 683, said:

> It is contended that the last statute is void, in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights which are secured by the fourteenth amendment to the constitution of the United States. It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for those objects; and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states.

The same doctrine is stated in numerous other cases decided by this court, both before and after the Powell case. From one of them we take the following very pertinent excerpt:

> No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. This conclusion is unavoidable, unless the fourteenth amendment of the constitution takes from the states of the Union those powers of police that were reserved at the time the original constitution was adopted. But this court has declared, upon full consideration, in Barbier v. Connolly, 113 U. S. 31, that the fourteenth amendment

had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

Mugler v. Kansas, 123 U. S., p. 663.

It is therefore plain that the police power of the state operates as well upon private property as upon that in which the state as sovereign has a direct interest. If the subject-matter of the legislation is such that the public has an interest in it, then it is a proper matter of police regulation, even though, incidentally, private property may be injuriously affected, or its value entirely destroyed.

The same line of cases hold that the fourteenth amendment was in no wise intended to and does not limit the police power of the states. The right of the legislature to restrict and often to prohibit the use of property in which the public has an interest because dedicated by the owner to a public use has been many times recognized by this court. It is not easy to distin-

guish between the right to regulate property because the public has an interest in it through its dedication to public uses, and the right to regulate property in which the public, in a far broader sense, and in a far greater degree, has an interest because of the very nature of the property itself. The rule probably is the same in both cases; that is, the public has an interest in both cases, being affected by the use or abuse of the property. And who can rationally say that the interest of the public in the rates of toll to be charged by the owner of a grist mill possesses more than a small fraction of importance compared with that which attaches to so tremendous an affair as the natural gas resources of the state of Indiana? Property in natural gas is subject to police regulation on far surer ground than milling property, warehouses, bakeries and similar private investments in which the public have an interest only because a considerable number of people are likely to patronize them.

Affirming the constitutionality of an act pertaining to coal mining the supreme court of appeals of West Virginia, in the case of State v. Peel Splint Coal Co., 36 W. Va., p. 830, say:

> At once concede that the coal industry is a proper subject for the exercise of police regulation and it follows by all the authorities that the legislature and not the courts are to judge of the propriety and reasonableness of any given regulation, provided it be enacted for the avowed police purpose, and is not upon its face in excess

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> of the police power claimed. In other words, if any conceivable circumstances would justify the exercise of such police power, the legislature, and not the courts, is the judge of the existence and prevalence of such circumstances. Citing Munn v. Illinois, supra.

Commonwealth v. Tewksbury, 11 Met. 55, widely known as the Chelsea Beach case, is often cited. That was the case in which Tewksbury was indicted for the violation of a statute providing, among other things, that

> Any person who shall take, carry away, or remove by land or water, any stone, gravel, or sand from any of the beaches in the town of Chelsea * * * shall for each offense forfeit a sum not exceeding $20.

He defended on two grounds: first, that he was the owner of the land in fee, and the statute did not intend to prohibit him as the owner from taking gravel from it.

Secondly, that if the statute did apply to the taking of gravel from the owner's land, it was unconstitutional, under Article 10 of the "Declaration of Rights" of the Massachusetts constitution, which provides that

> No part of the property of any individual can be taken from him or applied to public uses without making him a reasonable compensation therefor.

The opinion is by Chief Justice Shaw, and, after holding the statute applicable as well to the owner of

the land as to others, that great jurist proceeds to dispose of both positions assumed by the defendant, as follows:

> The court are of opinion that such a law is not a taking of property for public use within the meaning of the constitution, but is a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with or injurious to the rights of the public.
>
> All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community. * * *
>
> Without hazarding an opinion upon any other question, we think that a law prohibiting an owner from removing the soil composing a natural embankment to a valuable navigable stream, port or harbor, is not such a taking, such an interference with the right and title of the owner as to give him a constitutional right to compensation and to render an act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property which the legislature have authority to make.

We submit that the statute of 1893 regulating the production of natural gas and oil is far within the boundaries of the doctrine laid down in the Tewksbury case. The gravel removed by Tewksbury was his absolute private property. It had always belonged to himself and predecessors in the ownership of the

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land from which it was taken. It was not migratory nor explosive nor dangerous. He was not required to reduce it to possession to fix his property right in it. Its removal and use did not reduce to any extent the gravel deposit on any other man's land. Its removal, however, was properly prohibited, and its commercial value perhaps entirely destroyed, because the public welfare required that the embankment or break-water formed by the Chelsea Beach remain unimpaired.

Commonwealth v. Alger sustains the constitutionality of the Massachusetts statute fixing a line beyond which riparian owners were prohibited from building private wharves on land of which they owned the fee.

The Rideout case was one which involved the constitutionality of the Massachusetts statute prohibiting the unnecessary and malicious erection by the owner of any fence, or other obstruction, exceeding six feet in height, on his premises, to the annoyance of adjacent owners.

In Lawton v. Steele, 152 U. S., p. 136, this court, affirming the constitutionality of the New York statute authorizing the seizure of fish nets, traps, etc., said:

> The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts in nearly every state in the Union. It is universally conceded to include everything necessary to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. * * *

> Beyond this, however, the state may interfere wherever the public interests demand it. And, in this particular, a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.

Davis v. State, 68 Ala., p. 63, involved the constitutionality of a statute restricting the transportation of cotton in the seed between certain hours of the day. With reference to the application of the Alabama constitutional guaranties of life, liberty, property, etc., the supreme court of that state used the following language, in deciding the case:

> It is sufficient to say that this constitutional barrier was "intended to protect property from confiscation by legislative enactments, and from seizure, forfeiture and destruction without a trial and conviction by ordinary modes of judicial proceeding." It is not, nor can it be maintained, that the act in question goes or attempts to go this far. It has never been seriously questioned that the *jus disponendi* is not an absolute, unqualified, or indispensable right attaching to property, but is subject to such regulations not inconsistent with the constitution, as in the judgment of the law-making powers the interests of society and good government may require. Citing Wynehamer v. People, 20 Barb. 567.
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> The prohibition in section 2 against transporting or moving is confined to "cotton in the seed" and such hours intervening between sunset of one

day and sunrise of the succeeding day. It does not inhibit all transportation, but seeks only to regulate and control it in one particular condition of a commodity. We regard this as a mere police regulation, the alleged impolicy or injustice of which is beyond the legitimate scope of judicial criticism. The primary object of this law is not to interfere with the right of property in its vendible character. Its object is to regulate traffic in the staple agricultural product of the state so as to prevent a prevalent evil, which, in the opinion of the law-making power, may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits to the public detriment. This the legislature had the power to do. There is no constitutional objection to it. Citing Munn v. Illinois, *supra*.

In the case at bar the primary object of the statute is not to prohibit the development, transportation and sale of petroleum. Unmistakably, whether judged by its terms or by the circumstances attending its passage and the evils sought to be remedied, its only object was to prevent gas and oil operators from suffering either oil or gas to escape in the open air. Where only one of these products issued from any given well there was little danger of its violation; but it sometimes happens that both gas and oil are found at the same level, and when this is the case, if the operator happens to be interested in oil and has no interest in the gas supply, he simply leaves his well uncapped,

placing a device in position to catch the oil, while permitting the gas to escape. In such case the effect of the statute would be, not to forfeit or confiscate any part of the land owner's property, but merely to compel him to confine the gas while taking the oil out, or if that is impracticable, to postpone the oil operations until the gas has been exhausted, by the legitimate uses to which it is constantly being put. There is no discrimination against any individual or class attempted. Natural gas is a dangerous explosive, liable to destroy life and property; and it is a noxious gas which pollutes the air, when permitted to escape, to such an extent as to cause sickness, asphyxiation and death to those who breathe it. It is therefore competent for the legislature not only to control and prohibit its waste as a measure of economy, but to fix conditions and safeguards practically without limit to which its production and use shall be subject.

> Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change.
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> Peik v. Chicago, etc., Ry. Co., 94 U. S., p. 178.
>
> If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature can not be stayed from providing its discontinuance by any incidental inconvenience which individuals or corporations may suffer.

Beer Company v. Massachusetts, 97 U. S., p. 32.

> If a subject is within the legislative power, the question whether that power is wisely or unwisely exercise is not a judicial one. If the power exists, then the legislature must determine the mode of its exercise unless the mode is prescribed by the organic law. If, to descend from a wide generalization to a narrow one, a subject is within the police power of the state, the question as to what regulations are proper or needful is one for legislative consideration and decision. It is a cardinal principle of law that legislative discretion can not be controlled by judicial decisions, and is not subject to judicial surveillance.

Jamieson v. Indiana Gas Co., 128 Ind., p. 561.

It is true that the act in controversy was passed upon the theory that the waste of gas in the manner contemplated by the statute involved an assault upon the general commercial welfare of the people rather than that the public morals, or public health was endangered. The authorities, however, from which we have just quoted, are in point because whatever threatens the general commercial welfare belongs in the same category with that which imperils the public health or public morals. We think the cases heretofore cited sufficiently establish this proposition. The fact that the plaintiff in error is an oil producer, and that the complaint does not show that it is wasting the oil produced is no excuse for wasting the gas. It may be conceded, for the sake of argument, that the

oil can not be produced without wasting the gas, when both are found at the same level (a most violent and wholly unwarranted assumption). Yet how does that help the position of the plaintiff in error? Will its learned counsel insist that a person may pursue with impunity a business that not only threatens destruction to the property of his neighbors, but puts in peril the property of the whole state, merely because he can not pursue his business at the particular place where he desires to conduct it without inflicting such injuries? Will they further insist that even the state is powerless to prohibit the continuance of such business, though the existence of its greatest natural resource is directly involved?

That is precisely the position of the plaintiff in error, and the other Alexandria oil producers. There are many places in the state of Indiana, as the legislature which enacted the statute of 1893 well knew, where oil may be produced without penetrating the gas deposit at all. It is equally well known that, where the two substances are found in the same reservoir, the oil will still remain to be produced and utilized after the gas is exhausted. The owners of the land under which it exists may reap the profits it insures after the full benefits of the natural gas deposits have been enjoyed. The question as to whether or not it was wise or politic or just for the legislature to attempt the conservation of the natural gas supply at the risk of curtailing the profits of the Ohio Oil Company be-

longed to that body as the law-making power of the state.

Many of the cases to which we have called the court's attention involved the consideration of state constitutions rather than the fourteenth amendment to the organic law of the nation, but in every one of them a constitutional provision similar in terms to those of the fourteenth amendment was invoked as a prohibition against legislation similar in character to that of the act now in controversy; and in most of them the issue was squarely raised as to the application of the fourteenth amendment. But, in all, the principle is distinctly enunciated that provisions in the organic law, whether state or national, designed to protect the life, liberty and property of the individual, have no application to the legitimate exercise of police power.

It is not contended by us that the legislature may arbitrarily prohibit the use and enjoyment of private property in which the public has no interest merely under the pretext of exercising police power; but within its legitimate domain it would be difficult to imagine a power more plenary or comprehensive. The only point to be determined is whether the subject is one for police regulation. If not, any act in relation to it, which seriously impairs or restricts the use of private property without compensation, is generally speaking void under the constitutional guaranties of the fourteenth amendment, as well as those of the fundamental laws of the several states. On the other

hand, if the subject be one upon which the police power of the state may rightfully operate, then practically the fourteenth amendment has set no bounds to the legislative will; for within its domain the legislature is as supreme as are the courts within theirs. Whether the value of private property is impaired, or its use greatly restricted, are matters absolutely of no consequence in determining whether or not an act of the state legislature relating to any proper subject of police regulation is violative of the inhibitions of the fourteenth amendment. The police power of the state is not circumscribed by that article. The guaranties of "life, liberty and property" therein contained were not intended to and do not affect the exercise of police power by the legislatures of the several states. Indeed, it is an indisputable fact that, in the exercise of that power over subjects properly within it, property is frequently taken "without due process of law." In the "taking of property" under the police power there is no implication that the owner will have compensation for it. In determining, therefore, the constitutionality of an act like that now under consideration we inquire, not whether the act is a reasonable or proper exercise of police power, but whether or not it is an exercise of police power at all. In other words, there is, we insist, properly speaking, no such thing as an unwarranted exercise of police power of the legislatures of the states. An act assuming to be passed in the exercise of police power is either valid by force

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of the legislative will directing its enactment, or it is void because it does not, properly speaking, belong to that class of legislation known as police regulations. This general principle has, we think, been uniformly recognized. Police power is a distinctly legislative power. The courts have no function with reference to it except to give force and effect to the legislative purpose. With the question as to whether or not a given statute is too drastic or too loose or ill-advised they have no concern. In this connection we venture to quote the following from the opinion of Judge Elliott, of the supreme court of Indiana, in State ex rel. Clark v. Haworth, etc., 122 Ind. 462, wherein (on p. 467) he adopts the language of Mr. Justice Bradley in the legal-tender cases:

> If it be true that the power is a legislative one, then it is indisputably true that the courts can not control the legislative discretion. This principle is elementary in constitutional law, and it needs no support from precedents or decisions; but the principle has been so well expressed by Mr. Justice Bradley that we quote his language. Replying to an argument that the mode in which the power was exercised was improper, this great judge said: "The answer is, the legislative department being the nation itself speaking by its representatives, has a choice of methods, and is the master of its own discretion." * * *
>
> We have adopted and applied this rule, and indeed we can not depart from it without a disregard of principle that no decision or precedent would excuse.

At least so far back as the Slaughter House cases, 16 Wall. 36, the application of the fourteenth amendment to matters of police was denied by this court. And the principles there enunciated have been uniformly followed in the later cases.

Giozza v. Tiernan, 148 U. S. 657;
Gray v. Connecticut, 159 U. S. 74;
Plumley v. Massachusetts, 155 U. S. 461;
Budd v. New York, 143 U. S. 517;
Lawton v. Steele, 152 U. S. 133;
Powell v. Pennsylvania, 127 U. S. 678.

The federal courts, when called upon to review an act of a state legislature, have not been vigilant in seeking technical constitutional objections to it. The diverse conditions existing in the several states, widely separated as to the character of their population, industrial enterprises, social life and other characteristics, require that the legislature of each state shall have large discretion in determining what laws are best calculated to promote the general welfare of its people; and whoever assails the constitutionality of the statute passed by the legislature of any state, operating equally as to all persons and property within its jurisdiction, and attempting no discriminating restrictions against the rights of other states, and the citizens thereof, must point out some provision of the federal constitution to which such statute is clearly repugnant. The following language of Mr. Justice Harlan, in Plumley v. Massachusetts, 155 U. S., p. 479, seems

to us to apply with special force to the Indiana law here in controversy.

> We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the states to protect the morals, the health, and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of national and state authority. But in view of the complex system of government which exists in this country, "presenting" as this court, speaking by Chief Justice Marshall, has said "the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union," the judiciary of the United States should not strike down a legislative enactment of a state —especially if it has direct connection with the social order, the health, and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.

We can perceive no constitutional principle that would deny to the legislature of Indiana the right to protect its people in the comfortable enjoyment of what has become a necessity to them, in the form of natural gas procured from the great subterranean reservoir within the borders of the state, while conced-

ing the right in the legislatures of the states absolutely to prohibit the manufacture and sale of oleomargarine and similar substances and compounds intended as a substitute for butter.

It is claimed upon the highest scientific authority not only that certain of these compounds are wholesome and wholly free from any deleterious substance, but that they are positively far better for food than dairy butter; but the federal judiciary has steadily refused to take from the law-making power of the states, where prohibitive legislation of this class has been enacted, the right to absolutely and finally decide the question as to whether the public health of the people required the inhibitions launched against the traffic.

The natural gas supply means far more than commercial prosperity to the people of Indiana. That alone, however, would justify the enactment of rigid laws to prevent its waste; but the public morals are inseparably associated with the business prosperity of the people. The same is true of the public health as well as the educational and social status of its population. The effect upon the social, educational and moral life of the people that would result from the exhaustion of natural gas, and the consequent poverty, idleness and destitution that would inevitably follow, is simply incalculable.

It requires no expert in the science of sociology, however, to foresee, as the immediate and direct re-

sults of such a calamity, an immense deterioration
the moral and social standard.

The numerous decisions of this court affirming t
constitutionality of state laws regulating the tolls
warehouses, mills, and other business enterprises
voted more or less to public uses, have settled the d
trine that police power is not confined in its operati
to subjects affecting the public health, the public m
als or the public safety. The fourteenth amendme
is not more restrictive upon the power of the sta
than is the fifth amendment upon the power of c
gress, and it is abundantly established that the p
vision of the latter article for the protection of li
liberty and property does not prevent congress fr
protecting the harbors and rivers and other territo
within its jurisdiction, even though such legislati
should incidentally cripple or destroy large inve
ments in private business of a perfectly lawful ch
acter.

United States v. North Bloomfield Mining C
81 Fed. 243;
Murray's Lessee v. Hoboken Land Co.,
How. 272.

The North Bloomfield Gravel Mining Compa
case grew out of certain hydraulic mining operati
conducted by that company. It was claimed, on
half of the government, that the waters of the riv
into which the mine drained, were "obstructed" by
deposit thus carried into the stream. An act of c

gress made the operations of the mining company unlawful because of their effect upon the river; and a bill was filed in the United States Circuit Court for the Northern District of California, for injunction. The constitutionality of the act of congress was assailed by the mining company on much the same ground as that occupied by the plaintiff in error in its attack upon the Indiana statute; but the circuit court not only held the law constitutional, but very emphatically declared the legislation in question to be conclusive as to what constituted an obstruction, and this without reference to its effect upon the mining company's business.

The case was again before the Circuit Court of Appeals, and the decision is reported 88 Fed. *supra.*

The doctrine enunciated in this case is that congress need not stop to inquire what may be the effect upon some one's private business when about to enact legislation for the protection of navigable rivers, or other subjects within its control. The business of hydraulic mining is certainly a legitimate one. In California it is perhaps the principal industry of the state. The North Bloomfield Mining Company, so far as disclosed by the opinion, was depositing no more refuse in the river than was absolutely necessary in the operation of its business. On the contrary, as we understand the case, the continuance of the company's business was involved in the question of its right to discharge the substance into the river. In denying such

right the United States circuit court, according to the definition contended for by the plaintiff in error, was "confiscating" the mining company's property. That argument, however, was not permitted for one moment to impeach the constitutionality of the act of congress, nor to stay the injunctive relief prayed for.

Much was said in the state court about the averment of the oil company's answer to the effect that the oil product issuing from its wells was of greater value than the gas product, and it will be argued that there is a question of public policy raised by this averment appealing strongly in behalf of the plaintiff in error. It will be observed, however, that the answer only refers to the particular wells mentioned in the complaint; it does not pretend that the oil interest at large even approached in value and importance the natural gas interests imperiled by the operations of the plaintiff in error; and, in determining whether or not the act in question is constitutional, we are dealing with the broad question of comparative value to the public, instead of the narrow question as to whether the particular wells operated by the plaintiff in error produced gas or oil of greater value. We have no idea of conceding that, even though the injury done to the oil interests was largely in excess of the benefits accruing to the public, through the restrictive legislation concerning waste; such legislation must therefore be invalid. On the contrary, it was for the legislature, and not the courts, to determine the policy or impol-

icy of such legislation, and one would not even cast suspicion upon the constitutionality of the act by demonstrating its economic folly.

Still, it is not profitless to look at the economic side of the question as it appears from the history of the natural gas and oil development in Indiana; and it is impossible to do so without perceiving the immense importance of the natural gas supply, and the comparative inconsequential character of the oil interest.

At the end of 1896 the total oil production of the state of Indiana, as shown by the report of the state geologist, was only fifteen millions one hundred thirty-six thousand and fifteen barrels, worth, in round figures, seven millions of dollars. This represented practically the total acquisition to the state from its oil product; since oil, unlike gas, does not attract industrial enterprises, nor develop the material resources of the locality where the same is found, except to the extent that its market value may enrich its producers. On the other hand, the chief value of natural gas to the state lies in its immense influence upon the development of its industrial system, as well as the inestimable contribution to the comfort, enjoyment and happiness of its people. The effect of natural gas upon the wealth and development of the community where the same is found is very well illustrated in the history of Madison county, Indiana, where the operations of the plaintiff in error were carried on and where this suit was originally brought. In

1887 (when natural gas was first discovered in that county) the total assessed valuation of its property, real and personal, was nine millions eight hundred thirty-seven thousand five hundred ninety-five dollars. Under the mighty impulse which the discovery of natural gas gave to its commercial and industrial activity the assessed valuation increased, within the next ten years, to more than thirty-one millions of dollars; in round figures a gain of about twenty-one millions of dollars, or three times the total value of all the petroleum produced in the entire state since its discovery.

Now what was true of Madison county was equally true of a great many other counties; and these figures represent the net gain in wealth, whereas the figures given as the total value of the oil production represent the *gross* value, with no deductions for the cost of producing.

Furthermore, the larger portion of the oil product was obtained from the non-gas-bearing rock, and it was merely to facilitate the oil production for the limited and comparatively unimportant territory, where the oil and gas are found together in the same rock stratum, that it was proposed to sacrifice the entire natural gas interests of the state.

All these facts, so far as they had been demonstrated at that time, were before the legislature when the act of 1893 was passed. Gas and oil had both been discovered within the state several years prior to that time. Their relative importance to the public

was known. As to how far the preservation of the gas would cripple the production of the oil, if at all, was a legislative question purely.

The plaintiff in error can not in this court argue the unconstitutionality of the act in question merely because certain wells owned by it produce more oil than gas.

That the act in question was a perfectly legitimate and proper exercise of police power seems clear to us, both on principle and authority.

Respectfully submitted,

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OHIO OIL COMPANY *v.* INDIANA (NO. 1).

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 84. Argued December 18, 19, 1899. — Decided April 9, 1900.

The provision in the act of March 4, 1893, of the State of Indiana "that it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles," is not a violation of the Constitution of the United States; and its enforcement as to persons whose obedience to its commands were coerced by injunction, is not a taking of private property without adequate compensation, and does not amount to a denial of due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, but is only a regulation by the State of Indiana of a subject which especially comes within its lawful authority.

THE title, preamble and first section of a law enacted March 4, 1893, by the State of Indiana, (Acts of 1893, c. 36, p. 300,) are as follows:

"An act concerning the sinking, safety, maintenance, use and operation of natural gas and oil wells, prescribing penalties and declaring an emergency.

"Whereas, great danger to life, and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural gas and oil wells; therefore,

"SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within

such well or proper pipes or other safe receptacle, for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles."

The remaining sections of the law in question are printed in the margin.[1]

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[1] SEC. 2. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one half inch as great as the hole of such well, to extend at least three feet above the salt water level, where salt water has been struck; where no salt water has been struck, such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the Trenton limestone, or any other gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with the diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been "shot," the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand, stone and dry cement, so as to form a concrete up to a point at least eight feet above the top of the gas or oil-bearing rock or rocks, and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid, which shall be properly rammed as aforesaid. The casing from the well shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball eight inches in diameter shall be dropped in the well and securely rammed into the shale by the driller or owner of the well, after which not less than one cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

SEC. 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which such violation shall continue; and all such penalties shall be recoverable in a civil action or actions, in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and costs of suit.

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The issue which this record presents, on the subject of the law just referred to, is this: Did the enforcement of the first section of the statute produce as to the persons whose obedience to its commands were coerced by injunction, a taking of private property without adequate compensation; that is, did the execution of the statute amount to a denial of due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United Statutes?

The controversy was thus initiated. The State of Indiana, through its attorney general, filed a complaint in the Circuit Court of the county of Madison in the State of Indiana, against the Ohio Oil Company, a corporation organized under the laws of the State of Ohio, but authorized to carry on its business in the State of Indiana, as it had complied with the regulations enacted by that State as to foreign corporations doing business therein. The cause of complaint was thus stated:

"Plaintiff says that for many years heretofore there has

SEC. 4. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands situate adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section one of this act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this State against the owner, lessee, agent or manager of said well, and each of them jointly and severally, to recover the cost and expense of such tubing and packing, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

SEC. 5. Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section two of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well, and plug and fill the same in the manner provided by section two of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporation so failing, jointly and severally, to recover the costs and expenses of such plugging and filling, together with attorneys' fees and costs of suit. This shall be in addition to the penalties provided by section three of this act.

existed, underlying the counties of Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells and other counties of the State of Indiana, a large subterranean deposit of natural gas, occupying a reservoir of large extent, with well-defined boundaries, and utilized for fuel and light by the people of those counties and many other counties and cities of Indiana, including Indianapolis, Fort Wayne, Richmond, Logansport, Anderson, Muncie, Marion, Kokomo, and others of the most populous cities of said State, to which cities said gas is conducted, after being brought to the surface of the earth, through pipes and conduits, by means of which many hundreds of thousands of the people of the State of Indiana are now, and have been for more than ten years last past, continuously supplied with gas for light and fuel; that said natural gas, underlying the counties aforesaid and other portions of the State, is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir in which the gas is confined under great pressure and from which it escapes, when it is permitted to do so, with great force.

"The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural gas deposit to the State and to its citizens is many millions of dollars; that since the discovery of said gas deposit in 1886 immense sums of money have come into the State and have been invested in large manufacturing interests, and other vasts sums of money belonging to the people of the State of Indiana have been invested in similar enterprises, causing a great increase in the population, principally in the territory underlying which said gas is found. Many cities in and adjacent to the gas territory, including those named, are wholly dependent for fuel upon natural gas, and for that reason the people of the State of Indiana have become and are interested in the protection and continued preservation of the natural gas supply; that many millions of dollars invested in manufacturing and other properties in and near said gas territory are wholly dependent for their continued preservation and for the permanent value of their property upon said natural gas supply; that their location and establishment in said gas territory was due

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to the presence of natural gas underlying the same, without which such enterprises could not operate at a profit, and that in the event the supply of gas should be exhausted in said territory many of such manufacturing enterprises, in which thousands of the citizens of Indiana find employment at remunerative wages, will be compelled to stop operation.

"That their employés will be thereby thrown out of employment, and many of them, being dependent upon their labor for support, may and will become charges upon the State and its several municipal subdivisions; that the property of said manufacturing enterprises and the vast investments depending upon them and related to them will become worthless and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now interested in said enterprises as aforesaid.

"That in the cities named and in all the territory known as the 'gas belt' the inhabitants have for years used practically no other fuel than natural gas; that their houses have, in many instances, been constructed with a view to the use of such fuel, and will have to be differently equipped before other kinds of fuel can be used; that the cost of natural gas as fuel to the people of the 'gas belt,' who number several hundreds of thousands, is very much less than that of any other fuel that has ever been or can be procured by them, and that to the other inhabitants of the State using said natural gas it has become and is a source of great convenience, comfort and increased happiness, because of its cheapness, convenience and cleanliness as fuel.

"That many small villages in and near the gas territory have within a few years become flourishing and opulent cities.

"That the State's wealth and its revenues derived from taxation on account of such increased population and the various interests that have been fostered and supported by natural gas have been greatly increased, and will, in the event natural gas gives out, be correspondingly curtailed.

"That the State of Indiana, relying upon the permanent supply of natural gas, has at great expense equipped many of its public institutions, including the state-house, the Central and

other hospitals for the insane, the asylums for the blind and deaf and dumb, the institution for the care of orphans of American soldiers, and other public institutions owned and maintained by the State of Indiana and its various municipal subdivisions, together with the court houses in many counties, and a vast number of public schools, for the use of natural gas as a fuel, by which the cost of maintaining the public buildings and institutions above named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased.

"That the supply of natural gas underlying the territory aforesaid is so placed in such Trenton rock that the diminution or consumption of said gas taken from said reservoir affects and reduces correspondingly the common supply.

"That if the gas supply is husbanded and protected it will last for many years and continue to furnish the various cities named with abundant fuel, and the population, wealth and other material interests of the State will continue to be benefited and enhanced and the comfort, happiness and enjoyment of the people of the State greatly increased.

"That underlying a portion of said natural gas territory and at the same levels, occupying the interstices — said Trenton rock in common with said gas, are large quantities of petroleum oil; and that, because of the volatile character of said gas and the pressure under which it is confined in said Trenton rock when said reservoir is tapped by wells drilled into the same from the surface of the earth, said gas and oil will and do escape into the open air in great volumes, unless securely confined in tanks or other proper receptacles.

"That on or about the 25th day of May, 1897, said defendant, the Ohio Oil Company, drilled, near the city of Alexandria, in said Madison County, a number of wells into said gas and oil bearing rock, producing natural gas and petroleum as aforesaid in large quantities, which wells are known by the name of the land owner upon whose land they are situated, which name and the description of said wells are as follows, to wit."

The complaint then enumerated five gas and oil wells which

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had been opened and were being operated by the defendant for extracting oil, and averred as follows:

"That instead of securely anchoring said wells and each of them when so drilled so as to confine within the same or within tanks or pipes or other safe receptacles the natural gas produced therefrom within two days after said wells were respectively completed and gas and oil was struck therein, the said defendants, ever since the completion of said wells, all of which have been completed for periods varying from four to nine months, have unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been greatly diminished, and the property of its citizens in and near said gas territory dependent upon the continued supply of said natural gas for fuel, as aforesaid, has been greatly damaged and decreased in value.

"That the defendants and each of them avow their purpose to permit said gas to escape continuously and indefinitely hereafter from such wells, and refuse to make any effort to confine the same, but declare their purpose to drill other wells in said gas territory and permit the gas therefrom to flow and escape into the open air, and that if said gas continues to flow from said wells the supply of natural gas upon which the citizens of said State depend, as aforesaid, will be greatly diminished; that the pressure of said gas, as found in said Trenton rock, will be greatly diminished, and that by the diminution of said pressure water will accumulate in said rock stratum and ultimately entirely displace and overcome said gas supply.

"Plaintiff, therefore, says that, because of the wrongful acts of defendants above described, heretofore committed and now continuing, its property and that of its citizens has been and will continue to be essentially interfered with, and the comfortable enjoyment of the lives of its citizens greatly interrupted."

Averring the irreparable injury to result from allowing the wells to continue to flow, as stated, the inadequacy of the enforcement of the penalties provided in the statute to meet the evil complained of, and the fact that a multiplicity of suits would be engendered if the writ of injunction prayed for was not issued, the bill charged —

Statement of the Case.

"That the value of the gas wasted by permitting said several wells to remain open each day is of great value, and that, in addition to the value of the same, the whole gas territory or field is greatly damaged by permitting said wells to remain open, in that what is known as 'back pressure,' resulting from the confinement of said gas, is in a great measure relieved and destroyed when said gas is liberated in the manner aforesaid, and that said back pressure is necessary throughout said field in order to prevent the flow of water into said rock stratum and the consequent displacement of the gas therein contained; that, for the protection of said gas supply from the invasion of salt water, it is necessary that in the use of gas from wells drilled into said reservoir only a fraction of the entire volume of said wells should be used, to the end that the back pressure shall be maintained at as high a pressure as possible, and that any other or freer method of using said gas has a tendency to expose the same to danger of salt water, as aforesaid."

The prayer was as follows:

"And plaintiff therefore prays that a temporary order issue forthwith from this court prohibiting, restraining and enjoining said defendant, its agents, servants and employés, from further suffering or permitting the natural gas produced in said wells or any of them, or any part thereof, to longer escape therefrom, and that said defendant be ordered, directed and commanded forthwith to securely confine the same either by anchoring each of said wells or by confining the gas produced therefrom in tanks, pipes or other proper receptacles, and that failing or refusing so to do the sheriff of Madison County be ordered and directed forthwith to procure necessary materials and labor and thereby anchor, secure and confine the natural gas produced from said wells and each of them, and that the expense of so doing be taxed as part of the costs of this suit.

"And the plaintiff further prays that upon the final hearing of this cause said defendant company, its officers, servants, agents and employés, be perpetually enjoined and prohibited from further suffering said gas to escape, and that they be forever thereafter commanded to confine said gas safely and securely in pipes, tanks or other proper receptacles, and for all proper relief."

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The temporary injunction issued as prayed for. The defendant appeared and demurred to the complaint as not stating a cause of action. This was overruled. The defendant then answered as follows:

"The defendant, further answering, says that before and at the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock below in said county of Madison, and that in the carrying on of said business it has expended many thousands of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells and for pipes and pipe lines, all of which it then owned and still owns.

"The defendant admits that it drilled the well complained of herein, but says that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county, and having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

"That said well complained of was not drilled in or near any village, town or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same as so constructed and operated is not dangerous to life or property.

"That said well was so drilled and completed, oil was found therein in paying quantities, and the defendant proceeded to and did save and utilize the same, paying to the land owner the stipulated royalties therefor, and so operated the same with knowledge, approbation and consent of such land owner, and was so operating the same solely as an oil well and in entire good faith at the time of the commencement of this action; all of which was so done under and by virtue of a lease to defendant by the owner of said land granted before the commencement of this suit, under which lease defendant owns all the gas and oil in said well and under said land, and said well is of great value as an oil well.

"That in said well and in the same strata of rock whence such

oil was produced there were also found at said time quantities of natural gas, which by its own pressure escaped through said pipes and into the open air, said pipes being the same as the ones through which said oil was produced and saved, and in so saving such oil defendant utilized such gas as power, force and agency to raise said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural and ordinary method of raising and saving oil in such cases.

"And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property and profits, will be entirely destroyed and the people of said county and State will be deprived of the use and profits of such oil, which is of vastly more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, with the most improved machinery and appliances known to the world, and with employés of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill.

"The defendant further alleges that for many months before the completion of said well it was openly and publicly engaged in acquiring territory, in equipping said plant, in constructing such oil lines, and in incurring the liabilities and paying the money therefor, as hereinbefore alleged, all with the knowledge and acquiescence of the plaintiff and with no notice or knowledge whatever to or on the part of defendant that it would not be allowed to operate such well or wells until after the said money had been so expended and after said well had been so completed.

"That in the territory where said well complained of is situated there are a number of paying oil wells, owned and operated by various persons and corporations, and said field, when

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properly developed, may reasonably be expected to be a large one for the production of oil, which will be and is of great value to the people of said county."

Referring to the law of Indiana, the context of which has already been stated, the answer contained this averment:

"This defendant further alleges that said act of the general assembly of the State of Indiana, as above set out, violates the Fourteenth Amendment of the Constitution of the United States in this, that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the laws."

The State demurred to the answer as not alleging facts sufficient to constitute a defence. This demurrer was sustained. The defendant refusing to answer further, a decree granting a permanent injunction was entered. An appeal having been prosecuted to the Supreme Court of the State of Indiana, in that court the decree of the trial court was in all respects affirmed. 50 N. E. Rep. 1125. This writ of error was thereupon allowed.

Mr. M. F. Elliott and *Mr. George Shirts* for plaintiff in error.

Mr. C. C. Shirley and *Mr. William M. Taylor* for defendant in error. *Mr. Merrill Moores* was on their brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The assignments of error all in substance are resolvable into one proposition; which is, that the enforcement of the provisions of the Indiana statute as against the plaintiff in error, constituted a taking of private property without adequate compensation, and therefore amounted to a denial of due process of law in violation of the Fourteenth Amendment.

When this proposition is analyzed by the light of the facts which are admitted on the record, it becomes apparent that the foundation upon which it must rest involves two contentions which are in conflict one with the other; in other words, the argument by which alone it is possible to sustain the claim be-

comes, when truly comprehended, self-destructive. Thus, it is apparent, from the admitted facts, that the oil and gas are commingled and contained in a natural reservoir which lies beneath an extensive area of country, and that as thus situated the gas and oil are capable of flowing from place to place, and are hence susceptible of being drawn off by wells from any point, provided they penetrate into the reservoir. It is also undoubted that such wells, when bored from many points in the superincumbent surface of the earth, are apt to reach the reservoir beneath. From this it must necessarily come to pass that the entire volume of gas and oil is in some measure liable to be decreased by the act of any one who, within the superficial area, bores wells from the surface and strikes the reservoir containing the oil and gas. And hence, of course, it is certain, if there can be no authority exerted by law to prevent the waste of the entire supply of gas and oil, or either, that the power which exists in every one who has the right to bore from the surface and tap the reservoir involves, in its ultimate conception, the unrestrained license to waste the entire contents of the reservoir by allowing the gas to be drawn off and to be dispersed in the atmospheric air, and by permitting the oil to flow without use or benefit to any one. These things being lawful, as they must be if the acts stated cannot be controlled by law, it follows that no particular individual having a right to make borings can complain, and thus the entire product of oil and gas can be destroyed by any one of the surface owners. The proposition, then, which denies the power in the State to regulate by law the manner in which the gas and oil may be appropriated, and thus prevent their destruction, of necessity involves the assertion that there can be no right of ownership in and to the oil and gas before the same have been actually appropriated by being brought into the possession of some particular person. But it cannot be that property as to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property. The whole contention, therefore, comes to this: that property has been taken without due process of law, in violation of the Fourteenth Amendment, because of the fact that the thing taken

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was not property, and could not, therefore, be brought within the guarantees ordained for the protection of property.

The confusion of thought which permeates the entire argument is twofold: First, an entire misconception of the nature of the right of the surface owner to the gas and oil as they are contained in their natural reservoir, and this gives rise to a misconception as to the scope of the legislative authority to regulate the appropriation and use thereof. Second, a confounding, by treating as identical, things which are essentially separate, that is, the right of the owner of land to bore into the bosom of the earth, and thereby seek to reduce the gas and oil to possession, and his ownership after the result of the borings has reached fruition to the extent of oil and gas by himself actually extracted and appropriated. In other words, the fallacy arises from considering that the means which the owner of land has a right to use to obtain a result is in legal effect the same as the result which may be reached. We will develop the misunderstanding which is involved in the matters just stated.

No time need be spent in restating the general common law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them. And we need not, therefore, pause to consider the scope of the legislative authority to regulate the exercise of mining rights and to direct the methods of their enjoyment so as to prevent the infringement by one miner of the rights of others. *Del Monte Mining Co.* v. *Last Chance Mining Co.*, 171 U. S. 55, 60. The question here arising does not require a consideration of the matters just referred to, but it is this: Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed *situs*

under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In *Brown* v. *Spilman*, 155 U. S. 665, 669, 670, these distinctive features of deposits of gas and oil were remarked upon. The court said:

"Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown* v. *Vandergrift*, 80 Penn. St. 142, 147; *Westmoreland Nat. Gas Co.'s Appeal*, 25 Weekly Notes of Cases, (Penn.) 103."

In *Westmoreland & Cambria Natural Gas Co.* v. *De Witt*, 130 Penn. St. 235, the Supreme Court of Pennsylvania considered the character of ownership in natural gas and oil as these substances existed beneath the surface of the earth. The court said:

"The learned master says gas is a mineral, and while *in situ* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more

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careful consideration of the principles involved than of the mere decisions. Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract was uncertain,' as said by Chief Justice Agnew in *Brown* v. *Vandergrift*, 80 Penn. St. 147, 148. . . . They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas."

In *Hague* v. *Wheeler*, 157 Penn. St. 324, the question involved in the cause was the right of a land owner who had a gas well on his own land to complain of the escape of gas from a well situated on the land of another. After adverting to the rule embodied in the maxim, *sic utere tuo ut alienum non lædas*, and after referring to the exceptional nature of the right to acquire ownership in natural gas and oil, it was decided that the complainant was not entitled to relief. The court said, 340, 341:

"Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells. . . . In the disposition he may make of it (private property) he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provisions of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but,

subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public, as consumers, restrict and regulate it by statute."

Again, in *Jones* v. *Forest Oil Company*, (January, 1900,) 44 Atl. Rep. 1074, the same subject was once more considered. The complaint was filed by one land owner having a gas well on his land to enjoin the owner of adjoining property from using in a gas well thereon a pump which was asserted to have such power that its operation would draw away the oil and gas from the well of the complainant to that of the defendant. Reviewing the cases to which we have just referred, and after quoting the language of Chief Justice Agnew, in *Brown* v. *Vandegrift*, *supra*, wherein as we have seen oil and gas were by analogy classed as "minerals *feræ naturæ*," the court decided:

"From these cases we conclude that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface."

Again, applying the consequences of the doctrine just stated, the court declared:

"If possession of the land is not necessarily possession of the oil and gas, is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make the production of his wells as large as possible?"

A brief examination of the Indiana decisions, on the subject of oil and natural gas, and the right to acquire ownership thereto, will make it apparent that from the peculiar nature of these substances courts of that State have announced the same rule as that recognized by this court in *Brown* v. *Spilman*, *supra*, and which has been applied by the Supreme Court of the State of Pennsylvania. In *State ex rel. Corwin* v. *Indiana & Ohio Oil, Gas & Mining Co.*, 120 Indiana, 575, a law of the State of Indiana which made it unlawful for any person to conduct natural gas beyond the State, and imposing penalties for so doing, was assailed as unconstitutional because repugnant to the commerce clause of the Constitution of the United States. The court held the statute to be void for the asserted cause. The

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property in natural gas when reduced to actual possession was decided to be like any other property, and therefore the subject of commerce, and within the protection of the Constitution of the United States. In *Jamieson* v. *Indiana Natural Gas & Oil Company*, 128 Indiana, 555, a law of that State which prohibited the transportation of natural gas through pipes at a greater pressure than three hundred pounds per square inch, or otherwise than by its natural flow, was attacked not only on the ground of its interference with the right of property which sprang into existence with the possession of the gas, but because also the act in question was a regulation of interstate commerce. Both contentions were decided to be without merit, substantially on the ground that the dangerous nature of the product, its susceptibility to explosion and the consequent hazard to life and property which might arise from its movement through pipes, made the act of transmitting a fit subject for police regulation. In the course of its opinion the court said:

"The local character of such a substance as natural gas is, we repeat, marked and peculiar. It is a natural product, and its source is in the soil or rocks of the earth. It is as strikingly local as coal or petroleum; and yet no one has ever questioned the power of a State to enact laws governing mining. . . . It is so essentially local that only local regulation can be effective or appropriate. It is found in very few localities, and the character of locality is impressed upon it more clearly and strongly than upon almost any other natural product in the world."

Again, said the court:

"The local and peculiar character of natural gas makes it almost impossible that it should be the subject of general national regulation. . . . Upon this point we affirm that natural gas is characteristic and peculiarly a local product; that its production is confined to a limited territory; that because of its local characteristics and peculiarities it is a proper subject for state legislation, and cannot, so far as regards local production, be made the subject of general legislation by Congress."

In *People's Gas Company* v. *Tyner*, 131 Indiana, 277 and

280, the controversy was this: A lot owner in a town filed a bill for an injunction to prevent a neighboring lot owner from using nitro-glycerine "to shoot" a gas well on his property. The court refused the injunction. In the course of the opinion it was said:

"It has been settled in this State that natural gas when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. *State* v. *Indiana & Ohio Oil Gas & Min. Co.*, 120 Indiana, 575. Water, petroleum, oil and gas are generally classed by themselves as minerals possessing in some degree a kindred nature."

After quoting authorities relating to subterranean currents of water, and treating gas and oil before being reduced to possession as of a kindred nature, the court said:

"Like water it is not the subject of property, except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

The case of *Brown* v. *Vandegrift*, 80 Penn St. 142, from which we have previously quoted, was then referred to, and the analogies between oil and gas and animals *feræ naturæ* were approved and adopted. In *Townsend* v. *State*, 147 Indiana, 624, the constitutionality of a statute forbidding the burning of natural gas in flambeau lights was attacked because it was asserted to violate the Fourteenth Amendment to the Constitution of the United States and various provisions of the constitution of the State of Indiana. The court held that the statute was not amenable to the assaults made upon it. In a full opinion reviewing the nature of the ownership in oil and natural gas, the power of the State to regulate and control their use and waste in the interest of all those within the gas field and of the public at large was elaborately considered. Reviewing its own previous adjudications, which we have cited, and those of the Supreme Court of the State of Pennsylvania, to which we have also referred, it was decided that the owners of the surface of the land within the gas field, whilst they had the exclusive right on their land to sink wells for the purpose of extracting the oil and gas, had no right of property therein

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until by the actual drawing of the oil and gas to the surface of the earth they had reduced these substances to physical possession. It was further held that in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all and of the public at large, the State could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein the gas and oil were deposited, as well as the public, had an interest, because in the preservation of these substances the well-being and prosperity of the entire community was largely involved. And it was upon the opinion announced in that case that the court rested its decree in the case now under review.

Without pausing to weigh the reasoning of the opinions of the Indiana court in order to ascertain whether they, in every respect, harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the State of Indiana, to be as follows. Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits without violating the rights of the other surface owners.

If the analogy between animals *feræ naturæ* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *feræ naturæ* belong to the "negative community;" in other words, are public things subject to the absolute control

of the State, which, although it allows them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking. *Geer* v. *Connecticut*, 161 U. S. 519, 525. But whilst there is an analogy between animals *feræ naturæ* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *feræ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *feræ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer* v. *Connecticut*, *supra*. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a co-equal right in them all to take from a common source of supply, the two

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substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *feræ naturæ*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. Indeed, the entire argument, upon which the attack on the statute must depend, involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them, in and to the substances contained in the common reservoir of supply, then as a necessary result of the right of property, its indivisible quality and the peculiar position of the things to which it relates, there must arise the legislative

power to protect the right of property from destruction. To illustrate by another form of statement, the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without devesting them of their property without adequate compensation, in violation of the Fourteenth Amendment, and this, although it be that if regulation cannot be exerted one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may devest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States.

These considerations are sufficient to dispose of the case. But as there are several contentions which seem to have been considered, in argument, as resting on different premises, though such in reason is not the case, we briefly notice them separately: First. It is argued that as the gas, before being allowed to disperse in the air, serves the purpose of forcing up the oil, therefore it is not wasted, hence is not subject to regulation. Second. That the answer averred that the defendant was so situated as not to be able to use or dispose of the gas which comes to the surface with the oil; from which it follows that the gas must either be stored or dispersed in the air. Now, the answer further asserted that when the gas is stored and not used the back pressure, on the best known pump, would, if not arresting its movement, at least greatly diminish its capacity. Hence it is said the law by making it unlawful to allow the gas to escape made it practically impossible to profitably extract the oil. That is, as the oil could not be taken at a profit by one who made no use of the gas, therefore he must be allowed to waste the gas into the atmosphere, and thus destroy the interest of the other common owners in the reservoir of gas. These contentions but state in a different form the matters already disposed of. They really go not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the State we may not interfere.

In view of the fact that regulations of natural deposits of oil

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and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the Supreme Court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the State of Indiana of a subject which especially comes within its lawful authority.

Affirmed.

OHIO OIL COMPANY *v.* INDIANA (NO. 2).

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 83. Argued December 18, 19, 1899. — Decided April 9, 1900.

The judgment below in this case is affirmed for the reasons given in *Ohio Oil Company* v. *Indiana*, *ante*, page 190.

THIS case was argued with No. 84, *ante*, 190, and by the same counsel.

MR. JUSTICE WHITE delivered the opinion of the court.

The defendant below was sued for the sum of certain penalties imposed by law for allowing gas to escape into the atmospheric air from an oil and gas well. The statute by which the penalties were imposed is the one we have considered and passed on in an opinion this day delivered in *Ohio Oil Co.* v. *Indiana*, No. 84, of this term. The defendant demurred to the complaint, and when the demurrer was overruled answered. The answer alleged that the statute imposing the penalties was repugnant to the Constitution of the United States, on the same grounds which we have to-day disposed of in the case referred to. From a judgment awarding the penalties,

which was affirmed by the Supreme Court of the State of Indiana, this writ of error is prosecuted. For the reasons given in case No. 84 the judgment is

Affirmed.

OHIO OIL COMPANY *v.* INDIANA (NO. 3).

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 85. Argued December 18, 19, 1899. — Decided April 9, 1900.

The judgment below in this case is affirmed for the reasons given in *Ohio Oil Company* v. *Indiana*, *No. 1*, *ante*, page 190.

THIS case was argued with No. 84, *ante*, 190, and by the same counsel.

MR. JUSTICE WHITE delivered the opinion of the court.

The Supreme Court of the State of Indiana affirmed a judgment of the trial court, awarding the sum of certain penalties incurred by violating a statute of the State of Indiana which came under our review in case No. 84, this day disposed of. The opinion in that case is conclusive of every question here arising, and for the reasons given in case No. 84, the judgment is

Affirmed.